No. Supreme Court, U.S.
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In The 931220 JAN 27 1994

Supreme Court of the United States

October Term, 1993

GEORGIANN L. GRACE and JAMES B. POTTS, JR.,

Petitioners,

vs.

FRANK MORGAN, JR., DWIGHT D. VINES and DAVID K. JEFFREY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeal for the Fifth Circuit err in its application of the *Connick v. Myers*[1] "public concern" test by scrutinizing the plaintiffs' motive in speaking and subordinating the content importance of the plaintiffs' speech to a motive inquiry.

2. Is a judicial inquiry into a plaintiff's motive for speaking required by the *Connick* "public concern" test? If so, does the *Connick* "public concern" test present a mixed question of fact and law requiring the motive inquiry to be submitted to the trier of fact?

3. Did the United States Court of Appeal for the Fifth Circuit err in holding that a threshold showing of "public concern" is an element of a plaintiff's burden of proof in a claim brought under the Petition Clause of the First Amendment of the United States Constitution?

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1. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

LIST OF PARTIES

Petitioners Georgiann L. Grace and James B. Potts, Jr.: Plaintiffs in the District Court and Appellants in the United States Court of Appeals for the Fifth Circuit.

Respondents Frank Morgan, Jr., Dwight D. Vines and David K. Jeffrey: Defendants in the District Court and Appellees in the United States Court of Appeals for the Fifth Circuit.

Defendants, Board of Trustees for State Colleges and Universities, Northeast Louisiana University, Glenn F. Powers and Patrick P. Garrett are no longer parties for reasons set forth in footnote 2, page 3 of the Statement of the Case.

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The Petitioners, Georgiann L. Grace and James B. Potts, Jr., by and through their attorneys, J. Rodney Ryan, Jr. and Rachelle D. Dick, hereby petition this Court to issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit entered on October 29, 1993, attached as Appendix A. (1a).

OPINIONS BELOW

1. The United States District Court for the Middle District of Louisiana granted Respondents' Motion for Summary Judgment by judgment entered on November 4, 1992, attached as Appendix B (17a).

2. The United States Court of Appeals for the Fifth Circuit affirmed the district court's grant of Summary Judgment in an opinion filed on October 29, 1993, attached as Appendix A.

STATEMENT OF JURISDICTION

1. Review is sought of the opinion of the United States Court of Appeals for the Fifth Circuit, filed on October 29, 1993 which affirmed the Judgment of the United States District Court of the Middle District of Louisiana granting Respondents' Motion for Summary Judgment, entered on November 4, 1992.

2. Jurisdiction of this Court is invoked pursuant to Article III, Section 2, Cl. 2 of the United States Constitution and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Free Speech Clause and Petition Clause of the First Amendment of the United States Constitution, and the Fourteenth Amendment of the United

States Constitution, which makes the First Amendment applicable to the states.

The statutory provisions involved are 42 U.S.C. § 1983, and Rule 56 of the Federal Rules of Civil Procedure (setting forth the proper standard for motions for summary judgment).

STATEMENT OF THE CASE

A. Proceedings and Disposition in the District Court

Petitioners, Georgiann L. Grace ("Grace"), and James B. Potts ("Potts) were plaintiffs and appellants in the proceedings below. Grace was an instructor at Northeast Louisiana University ("Northeast") from Spring 1978 through Fall 1984. Petitioner, Potts, was and is a tenured full professor at Northeast. In July, 1982, Grace and Potts filed suit in Louisiana state court arising out of their concern that faculty grievance pro*ceedings* at Northeast were conducted in violation of the Louisiana Administrative Procedure Act (La. R.S. 49:951) and federal and state constitutional due process guidelines. The claims of Grace and Potts in the state court suit were denied in the trial court and court of appeal. The Louisiana Supreme Court denied a writ of certiorari on January 27, 1984. At the conclusion of the state court suit, Grace was terminated by Northeast and Plaintiff, Potts, was "demoted" by Northeast.

On April 18, 1984, Petitioners filed this suit under 42 U.S.C. § 1983 claiming that their First Amendment rights were violated by the retaliatory acts of Defendants, administrators at Northeast, in response to their protected activity, the state court suit. The named Defendants in this suit were Board of Trustees for State Colleges and Universities (the "Board"), Northeast Louisiana University, Frank Morgan, Jr. ("Morgan"), Glenn F. Powers ("Powers"), Dwight D. Vines ("Vines"), David K. Jeffrey ("Jeffrey"), Patrick P. Garrett ("Garrett") and individual members of the Northeast

Faculty Appeals Committee ("FAC").[2]

Trial on the merits was had before a jury on April 8, 9, 10 and 11, 1991. Following Defendants' Motion for Directed Verdict, the First Amendment retaliation claim arising from the state court suit was sent to the jury. (C.A. Record Vol. 9, pp. 440).[3] In ruling on Directed Verdict, the Court found the Petitioners' *grievances* related only to private interests and, thus, did not meet the "public concern" test. However, the court referred the issue of retaliation for the state court suit to the jury. (C.A. Record Vol. 9, pp. 432-436). The jury deliberated and returned a verdict, on special interrogatories, in favor of Grace in the amount of $85,000, compensatory damages. The jury returned a verdict in favor of Potts in the amount of $10,000, compensatory damages and $25,000, punitive damages. Defendants Vines, Morgan and Jeffrey were cast in judgment by the jury. (C.A. Record Vol. 5, pp. 1455-1459).

On April 27, 1992, the trial court granted Defendants Motion for New Trial because of the court's failure to give a jury a special interrogatory regarding Defendants' *Mt. Healthy* defense.[4]

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2. Defendant, Powers, and the individual members of the FAC were dismissed at the conclusion of plaintiffs' case on the Defendant's Motion for Directed Verdict. (C.A. Record Vol. 9, pp.440) Defendants Garrett, Board and Northeast were dismissed by the court on other pretrial motions.

3. Petitioners references to the Court of Appeal record and records excerpts are designated throughout as C.A. Record Vol. ___, p___.

4. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (Holding that if plaintiff proves that First Amendment protected activity was a substantial motivating factor behind the retaliatory conduct then the burden shifts to the defendant to show that the action alleged to be retaliatory would have been taken absent the First Amendment protected activity.)

Defendants filed a post-trial Motion for Summary Judgment claiming, again, that Petitioners' speech was not protected under the First Amendment. (C.A. Record Vol. 6, pp. 2087-2096). In its Ruling on Motions, the district court concluded that, although the content of Petitioners' speech (state court suit) touched on a subject of "public concern" and was delivered in a public forum, the speech was unprotected because of Petitioners' "motive" in filing the suit.[5] (21a). Summary Judgment was entered by the district court on November 4, 1992. (26a).

B. Proceedings and Disposition in the Court of Appeal

On December 2, 1992, Petitioners, Georgiann L. Grace and James B. Potts, Jr., appealed the district court's judgment to the United States Court of Appeal for the Fifth Circuit (C.A. Record Vol. 6, pp. 2099-2101). On appeal, Petitioners raised only two issues; (1) the district court's grant of a new trial based on an erroneous special interrogatory, and (2) the summary dismissal of Petitioners First Amendment Free Speech and Petition Clause claims. Petitioners limited their appeal to include only Respondents Vines, Morgan and Jeffrey, those Defendants cast in judgment by the jury. Respondents did not appeal the district court's judgment nor did they answer Petitioners' appeal.

C. Statement of Facts

The state court suit was prompted when Grace's employer, Northeast, denied a request by Petitioners' counsel for modification of the faculty grievance procedure at Northeast to comport with the Louisiana Administrative Procedure Act and state and federal due process requirements. (61a). Petitioners filed suit in state court claiming that the Faculty Appeal Procedure violated the Louisiana Administrative Procedure Act and Article 1,

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5. The court afforded no weight to Grace's deposition testimony that the state court suit involved "corruption within the University and the breakdown of the faculty procedure itself". (23a).

Sec. 2 of the Louisiana Constitution of 1974. Petitioners sought no monetary damages but merely a declaration from the state court regarding the constitutional validity of the Faculty Appeal Procedure at Northeast. id. Named as Defendants in the state court suit were the Board of Trustees for State Colleges and Universities ("Board"), Northeast Louisiana University ("Northeast") and the Faculty Appeals Committee ("FAC") at Northeast.

The Petitioners requested that the state court recognize that property and/or liberty interests were involved in the grievances, thus requiring the Board, Northeast and FAC to provide procedural due process. Discovery in the state court suit was directed primarily to policies and procedures of the Board, Northeast and FAC, and was not in any way directed to the substance of the Petitioners underlying grievances. (C.A. Record, Exhibit 812.1, pp. 51-55, 59-67; 71-77; 81-91).

Petitioners and Defendants filed cross motions for summary judgment. On December 17, 1982, the state court granted the Defendants' Motion for Summary Judgment and dismissed the Petitioners claims. (C. A. Record, Exhibit 812.1, pp. 169-70). Petitioners appealed the court's decision to the Louisiana First Circuit Court of Appeal. On appeal of the state court suit the Petitioners reiterated their claims that grievance hearings at Northeast should be conducted in accordance with the Louisiana Administrative Procedure Act and constitutionally mandated "due process" requirements. The Petitioners claimed that the Louisiana Administrative Procedure Act is the measure of constitutional due process and that the Act applied to self-executing boards such as the Defendant Board. (33a-34a).

The Court of Appeal affirmed the finding of the district court in a ruling dated November 23, 1983. (C.A. Record, Exhibit 812.4, pp. 33-38). Petitioners sought a Writ of Certiorari from the Louisiana Supreme Court raising the same claims that had been

raised in the trial court and Court of Appeals. (C.A. Record, Exhibit 812.4, pp. 11-30). The Louisiana Supreme Court denied writs on January 27, 1984. (C.A. Record, Exhibit 812.4, p. 219). *Grace v. Board of Trustees for State Colleges & Universities*, 444 So.2d 1223 (La. 1984).

Following the filing of the state court suit on July 12, 1982, Respondents, Vines, Morgan and Jeffrey, set in motion a chain of events that resulted in the termination of Grace and demotion of Potts immediately following the end of the state court suit (Louisiana Supreme Court writ denial on January 27, 1984). The Respondents created a "pretext" for the retaliation, claiming that Grace was terminated because she held two degrees from Northeast. The Respondents tried to explain the fact that they fired Grace twelve days after the end of the state court suit by putting forth the excuse that they were attempting to eliminate "inbreeding".[6] The "inbreeding" defense began with correspondence by Respondent, Morgan, on September 2, 1982, only six weeks after filing the state court suit. (C.A. Record, Exhibit D-2).[7]

After the conclusion of the state court suit, Petitioner Potts, a tenured full professor, was subjected to a "de facto demotion." Both Grace and Potts were the victims of "trashing" of their personnel files. Respondents Morgan and Jeffrey filed numerous unsubstantiated derogatory comments about Petitioners in their

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6. "Inbreeding" is a term used in academia to refer to situation in which a faculty member obtains his/her last and highest degree from the Institution where he/she teaches.

7. The pretext is fully discussed in the Plaintiffs' opposition to Defendants' Post-Trial Motion for Summary Judgment (C.A. Record Vol. 6, pp. 2045-2057). Reference to testimony in the Transcript is included therein.

personnel files without their knowledge.[8] Suffice it to say that the retaliatory acts were so compelling that the jury rendered judgments against Respondents Vines, Morgan and Powers. The evidence of retaliation for filing the state court suit was so complete that Respondent, Morgan, filed a post-trial affidavit virtually conceding retaliatory motive. In his affidavit Morgan stated that he was "understandably irritated" by the Petitioners' grievances but "was not upset" by the state court suit raising "procedural issues". (C.A. Record Vol. 6, pp. 1888-1889). The affidavit was intended to suggest that the retaliation was motivated by Petitioners' grievances, not the state court suit.

BASIS FOR FEDERAL JURISDICTION

I. Jurisdiction in the United States District Court for the Middle District of Louisiana was vested and proper pursuant to 18 U.S.C. §1981 and 28 U.S.C. § 1343(3), (4).

II. Jurisdiction in the United States Fifth Circuit Court of Appeal was vested and proper pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The granting of a writ in this case is appropriate and necessary. First, the Circuit Courts of Appeal are divided on the proper application of the "public concern" test enunciated by this court in *Connick, infra,* as applied to cases arising under the Free Speech Clause of the First Amendment of the United States Constitution.

Second, the Fifth Circuit has misconstrued and misapplied the *Connick* test, resulting in removal of fact-bound determinations, such as speaker motive, from the domain of the jury.

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8. This was originally the basis of the Petitioners' liberty interest claim which was dismissed by the District Court on the defendants' Motion for Directed Verdict.

Finally, this Court should grant a writ in this case because this Court has not established the requisite burden of proof in a Petition Clause case brought by a public employee. A writ acceptance is necessary to provide guidance to lower courts regarding the scope of protection afforded to public employees under the Petition Clause of the First Amendment.

I.

FREE SPEECH CLAIM: THE FIFTH CIRCUIT MISCONSTRUES AND MISAPPLIES THE CONNICK BALANCING TEST.

Petitioners claim that the Respondents retaliated against them because of the exercise of constitutionally protected speech. This Court has held that public employees do not, by virtue of their positions, shed their First Amendment rights to speak out on matters of "public concern". *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811 (1968). Many courts have recognized that the protection of "whistleblowers" insures that public employees will remain "the instruments of investigation". Courts have recognized that public employees are "uniquely qualified" to reveal "unseemly machinations" by their fellow employees because they observe them on a daily basis. *Brown v. Texas A&M University*, 804 F.2d 327, 337 (5th Cir. 1986).

An employee seeking protection for his speech must undergo a two-step judicial inquiry. The first issue is whether the employee's speech can be "fairly characterized as constituting speech on a matter of public concern". *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1689, 75 L. Ed. 2d 708 (1983). In determining whether the employee's speech involves a "matter of public concern" this Court has directed a review of the "content, form, and context" of the statement, as revealed by the whole record. 461 U.S. at 147-48. This test is referred to as the "Connick Balancing Test".

The second step in an evaluation of the protected nature of the speech involves a balancing of the strength of the employee's speech against the countervailing governmental interest in promoting efficient performance of public service. *Pickering*, 391 U.S. at 563. This test is referred to as the "Pickering Balancing Test" and requires that the court review the "manner, time and place" of the employee's speech to determine whether it is constitutionally protected. *Connick*, 461 U.S. at 152, 103 S. Ct. at 1693.

If the plaintiff succeeds in proving that his speech is constitutionally protected under the Connick Balancing and Pickering Balancing Tests, he must prove that the protected speech was a "motivating factor" in the employer's adverse employment decision. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). If plaintiff bears his burden of proof that his speech is protected and that it was a "motivating factor" in the employer's adverse employment decision, the employer may escape liability only if it can prove that the adverse employment action would have been taken absent the protected speech. *Id.* In the instant case, however, the trial court and appellate court dismissed Petitioners' claims finding that their speech was not protected under the Connick Balancing Test. No claim of disruption was made by the Respondents.

The application of the Connick Balancing Test is relatively simple. The trier of fact must analyze the employee's speech given the "content, form and context" involved. If the Connick Balancing Test reveals speech on a matter of even "limited public concern"[9], the speech is protected, unless the defendant has claimed and proven disruption under *Pickering*. In the instant case, Respondents have not claimed disruption and the only test

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9. Only one out of fourteen of the questions on the employee's questionnaire in Connick was deemed a matter of "public concern". Nonetheless, the court found this sufficient to move to the *Pickering* balance.

necessary to determine "public concern" is the Connick Balancing Test. The application of the Connick Balancing Test has tested the imagination of the Courts of Appeal.

A. The Courts of Appeal are Divided in Their Application of Connick

The Courts of Appeal have adopted numerous applications of the Connick Balancing Test, many of which are in direct conflict. Thus, the granting of a writ is appropriate in this case to resolve the conflict in the circuits. A review of appellate decisions indicates three applications which are most prevalent among the circuits:

1. Content is the controlling factor ("content determinative");

2. Content receives the most weight in the Connick Balancing Test ("content balanced");

3. Motive is controlling ("motive determinative").

The District of Columbia, First, Second, Sixth, Eighth, Ninth and Tenth Circuits have rendered decisions on the basis of the "content determinative" test.[10] The Third, Fourth, Seventh, Ninth, Tenth and

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10. **District of Columbia** - *Hall v. Ford*, 856 F.2d, 255, 260 (D.C. Cir. 1988); **First Circuit** - *O'Connor v. Steeves*, 994 F.2d 905, 913-915 (1st Cir. 1993), *cert. denied*, 126 L. Ed. 2d 593(1993); **Second Circuit** - *Frank v. Relin*, 1 F.3d 1317, 1330 (2nd Cir. 1993); *Bieluch v. Sullivan*, 999 F.2d 666, 671 (2nd Cir. 1993) (*petition for cert. pending*); *Piesco v. City of New York, Department of Personnel*, 933 F.2d 1149, 1157, (2nd Cir. 1991), *cert. denied*, 112 S. Ct. 331, 116 L. Ed. 2d 272 (1992); **Sixth Circuit** - *Meyers v. City of Cincinnati*, 979 F.2d 1154, 1159-90 (6th Cir. 1992); *Myers v. City of Cincinnati*, 934 F.2d 726, 729-30 (6th Cir. 1991); **Eighth Circuit** - *Shands v. City of Kennett*, 993 F.2d 1337, 1343-44 (8th Cir. 1993), *cert. denied*, ___ U.S. ___ (1994); *Crain v. Board of Police Commissioners*, 920 F.2d 1402, 1411 (8th Cir. 1990); *Smith v. Cleburne County*

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Eleventh Circuits have applied the "content balanced" test to cases decided by them.[11] The "motive determinative" test has been applied by the Fifth, Sixth, Eighth and Eleventh Circuits in decisions rendered by them.[12] The Sixth and Eight Circuits have

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Hospital, 870 F.2d 1375, 1382 (8th Cir. 1989), *cert. denied* 493 U.S. 847, 110 S.Ct. 142, 107 L. Ed. 2d 100 (1989); **Ninth Circuit** - *Burgess v. Pierce County*, 918 F.2d 104, 106 (9th Cir. 1990); *Gillette v. Delmore*, 886 F.2d 1194, 1197-98 (9th Cir. 1989), *cert. denied*, 114 S.Ct. 345 (1993); **Tenth Circuit** - *Powell v. Gallentine*, 992 F.2d 1088, 1090 (10th Cir. 1993); *Hicks v. City of Watonga*, 942 F.2d 737, 744 (10th Cir. 1991).

11. **Third Circuit** - *Versarge v. Township of Clinton New Jersey*, 984 F.2d 1359, 1365 (3rd Cir. 1993); *Holder v. City of Allentown*, 987 F.2d 188, 195-96 (3rd Cir. 1993); *Zamboni v. Stamler*, 847 F.2d 73, 78 (3rd Cir. 1988), *cert. denied*, 488 U.S. 899, 109 S. Ct. 245, 102 L. Ed. 2d 233 (1988); **Fourth Circuit** - *Stroman v. Colleton County School District*, 981 F.2d 152, 158 (4th Cir. 1993); *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75, 78-79 (4th Cir. 1988); **Seventh Circuit** - *Glass v. Dachel*, 2 F.3d 733, 740 (7th Cir. 1993); *Churchill v. Waters*, 977 F.2d 1114, 1121 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 2991 (1993); *Breuer v. Hart*, 909 F.2d 1035, 1038-39 (7th Cir. 1990); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1302 (7th Cir. 1990); *Gray v. Lacke*, 885 F.2d 399, 411 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029, 110 S.Ct. 1476, 108 L.Ed.2d 613, (1990); **Ninth Circuit** - *Hyland v. Wonder*, 972 F.2d 1129, 1138-39 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2337, 124 L. Ed. 2d 248, (1993); *Havekost v. U.S. Dept. of Navy*, 925 F.2d 316, 318 (9th Cir. 1991); *Roth v. Veteran's Adm. of Govt of U.S.*, 856 F.2d 1401, 1406 (9th Cir. 1988).

12. **Sixth Circuit** - *Grace v. Board of Trustees for State Colleges and Universities*, 92-9528 (5th Cir. Oct. 29, 1993) *(unpublished)*; *Gillum v. City of Kerrville*, 3 F.3d 117, 120-121 (5th Cir. 1993); *Mylett v. Mullican*, 992 F.2d 1347, 1349-50 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 345 (1993); *Wilson v. U.T. Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992), *cert. denied*, 61 U.S. 3667, 113 S. Ct. 1644, 123 L.Ed.2d 266 (1993); *Caine v. Hardy*, 943 F.2d 1406, 1416 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1474, 117 L. Ed. 2d 1474 (1992); *Dorsett v. Board of Trustees for State Colleges and Universities*, 940 F.2d 121, 124 (5th

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also applied the "motive determinative" test as well as the "content determinative" test.[13]

1. *Courts of Appeal Applying The Content Determinative Test*

The "content determinative" test is most ably addressed by the First Circuit Court of Appeals in *O'Connor v. Steeves*, 994 F.2d at 913-915 (1st Cir. 1993). In *O'Connor*, the court notes that the Courts of Appeal have taken differing approaches to the threshold inquiry of the Connick Balancing Test. The *O'Connor* court recognized the two qualifying criteria in *Connick* as (1) speech on a topic which is clearly a legitimate matter of inherent concern to the electorate, and (2) speech on a topic which would not necessarily qualify on the basis of its content alone and may require complete *Connick* analysis into the form and context. 994 F.2d at 914. The *O'Connor* court correctly noted that this Court in *Connick* dissected the content of the plaintiff's speech to see if any aspect of the speech touched on a matter of "public concern". In *Connick*, the speech, a questionnaire circulated by the plaintiff to 15 co-employees, arose in the context of the plaintiff's employment dispute. This Court found that only one question, out of fourteen, on the questionnaire touched on a matter of "public concern". The speaker's motive in disseminating questions in the questionnaire

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Cir. 1991); *Dodds v. Childers*, 933 F.2d 271, 273-74 (5th Cir. 1991); *Ayoub v. Texas A&M University*, 927 F.2d 834, 836-38 (5th Cir. 1991); *Gomez v. Texas Dept. of Mental Health*, 794 F.2d 1018, 1021 (5th Cir. 1986); *Terrell v. Univ. of Texas System Police*, 792 F.2d 1360, 1362-63, (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S. Ct. 948, 93 L. Ed. 2d. 997 (1987); **Eleventh Circuit** - *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993).

13. **Sixth Circuit** - *Barkoo v. Melby*, 901 F.2d 613, 619-620 (7th Cir. 1990); *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989); **Eighth Circuit** - *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197, 1198-99 (8th Cir. 1993).

was not scrutinized by this Court in testing whether protection would be afforded.

Other appellate courts share the *O'Connor* analysis and properly apply a "content determinative" test. In *Meyers v. City of Cincinnati*, 979 F.2d 1154, 1158-60 (6th Cir. 1992), the court was called upon to evaluate the "public concern" test of *Connick*. In *Meyers*, the court noted the *Connick* court's focus on speech concerning "an issue important to the greater community". 979 F.2d at 1158. In reviewing a number of cases which dealt with subject matter of "public concern" as a determinative issue, the court found that Meyers' speech on affirmative action policies and their possible effects on safety were "manifestly topics of public concern" and of "inherent public concern". 979 F.2d at 1160. In *Shands v. City of Kennett*, 993 F.2d 1337, 1343-44 (8th Cir. 1993), the court analyzed the "topics implicated" by the speaker and found that the "purchase of fire-fighting equipment" and manner in which the city was spending funds were "topics of inherent public concern". 993 F.2d at 1343. Without any review of form or context, the court found that the speech was protected. In *Gillette v. Delmore*, 886 F.2d 1194, 1197-98 (9th Cir. 1989), the court construed the content of statements made by a fireman regarding the "manner in which police and fire-fighters performed their duties on a particular occasion". 886 F.2d at 1197. In determining that the speech involved a matter of "public concern", the court placed no significance on the fact that plaintiff's speech "was not directed to the public at large" or intended to inform it of perceived problems. 886 F.2d at 1198.

In the instant case, the application of the "content determinative" test would have rendered Petitioners' speech on a matter of "inherent public concern" protected speech under the Connick Balancing Test. It is Petitioners' contention that *Connick* is clear authority for application of the "content determinative" test and that the tests applied by all other circuits are in violation of *Connick*.

2. *Content Balanced*

The "content balanced" test applied by the Third, Fourth, Seven, Ninth, Tenth and Eleventh Circuits is closely akin to the "content determinative" test. The only difference between the "content balanced" and "content determinative" test is that in the former, "content is the greatest single factor in the *Connick* inquiry", while in the latter, content is preemptive. *Churchill v. Waters,* 977 F.2d 1114, 1121 (7th Cir. 1992), *cert. granted,* 113 S. Ct. 2991 (1993). In *Zamboni v. Stamler,* 847 F.2d at 73, 78 (3d Cir. 1988), the court reasoned that, "were motive rather than content dispositive, the court [in *Connick*] would have had no reason to isolate the one question that was of "public concern" from all others". 847 F.2d at 78. Other cases of the Circuit Courts of Appeal agree that content "is always the central aspect" of the *Connick* inquiry. *Arvinger v. Mayor and City Council of Baltimore,* 862 F.2d 75 (4th Cir. 1988); *Kurtz v. Vickrey,* 855 F.2d 723, 727 (11th Cir. 1988). In *Kurtz,* the court noted that focusing solely on the employee's motivation "does not fully reflect the Supreme Court's directive" that the content, form and context of the speech must all be considered. The Court further noted that content of the speech is notably overlooked in a "motive determinative" type of analysis, although content is undoubtedly a material concern. 855 F.2d at 727. Under both the "content determinative" and "content balanced" approaches, Petitioners' speech in this case, which clearly addressed matters of "inherent public concern", tips the *Connick* balance in favor of protected speech.

3. *Motive Determinative Test*

The "motive determinative" test was applied to Petitioners' speech in this case. This test has its roots in the Fifth Circuit case of *Terrell v. Univ. of Texas System Police,* 792 F.2d 1360, 1362-63 (5th Cir. 1986), *cert denied,* 479 U.S. 1064 (1987). In *Terrell,* the Fifth Circuit recognized that an employee's speech is protected when he speaks (1) as a citizen upon matters of "public concern"

or, (2) as a citizen on a matter of general concern, not tied to a personal employment dispute. 792 F.2d at 1363. In its original form, the *Terrell* test seems to correctly analyze the two categories of protected speech under *Connick*. The first *Terrell* test addresses a subject matter of "inherent public concern" and should render speech protected regardless of the employee's motivation. The second *Terrell* test would protect the speech of an employee on even a matter of "general concern" where the context indicates that purpose of the employee's speech was to alert the public about wrongdoing in the government.However, subsequent application of *Terrell* by the Fifth Circuit has resulted in a "motive determinative" test, where a speaker's motive preempts the content of his speech. This test is no longer a balancing test. Rather, the Fifth Circuit directs judicial inquiry into the speaker's motive for speaking and discounts the social value or significance of the content of the speech.

The *Terrell* test in its current form is most appropriately described in recent Fifth Circuit discussion of the issue:

> . . . In *Terrell* . . . we did not focus on the inherent "importance" of the subject matter of the speech, but on the extent to which the terminated employee spoke as a citizen or employee. . . . *This focus on the hat worn by the employee when speaking, rather than upon the "importance of the issue reflects the reality that at some level of generality almost all speech of state employees is of public concern . . .". Gillum v. City of Kerrville,* 3 F.3d 117, 121 (5th Cir. 1993)

(Emphasis added).

In the instant case, the Fifth Circuit reiterated its rationale in *Gillum* that the appropriate focus for the Connick Balancing Test is

on the "hat worn by the employee when speaking" rather than upon the "importance of the issue he addresses". (7a). Thus, the court focused only on the "primary motivation" of the Petitioners in speaking on a matter of "inherent public concern". It is Petitioners' contention that the "motive determinative test" is not a balancing test at all and violates the fundamental premise of the *Connick* decision that content is the most important part of its balancing test.

B. Application of a "Motive Determinative" Test to Petitioners' Speech Violates *Connick*

In the instant case, the trial court consistently found that the *content* of Petitioners' state court suit touched on matters of "public concern". In three rulings on motions, this finding was reiterated and culminated in its review of "content" on defendants' final summary judgment motion. In the district court's ruling on defendants' Motion for Summary Judgment, it stated as follows:

> . . . *The court further finds that the subject matter of the suit touches on matters of public concern*, i.e. whether faculty grievances are conducted in a fair manner in accordance with state and federal statutory and constitutional requirements. The public naturally has an interest in ensuring that professors at state universities are well qualified and productive teachers. Whether or not faculty grievance procedures are conducted in accordance with law and in a fair manner may indirectly affect the quality and efficiency of the teaching staff and be of interest to the public at large. . . ."

(21a) (Emphasis added).

Petitioners believe that this was a finding that the content of plaintiff's speech was one of "inherent public concern" and thus

protected under *Connick*. However, both the trial court and the Fifth Circuit Court of Appeals dismissed the "content" of the speech in favor of a review of Petitioners' "motivation" in making the speech.

The Petitioners state court suit urged issues of demonstrable "inherent public concern". The state court suit was a de*claratory judgment action*, not an action for damages or for personal profit (50a-61a). The suit was prompted by employee grievances filed by both of the Petitioners and the grievance procedure provided by the Respondents. Petitioners advised Respondents that they believed that the hearing procedure must be in compliance with the Louisiana Administrative Procedure Act La. R. S. 49:951, *et seq.* Respondents claimed that the Board of Trustees for State Colleges and Universities was a "self-executing" body and not subject to the Louisiana Administrative Procedure Act. This issue was a "public issue", having prompted a 1972 suit against Louisiana State University urging the application of a general state statute to the Louisiana State University Board of Supervisors, a "self-executing" entity. *Student Government Association of L.S.U., etc. v. Board of Supervisors*, 264 So. 2d 916 (La. 1972). This same issue was the subject of opinion letters of the Louisiana Attorney General (C.A. Record, Exh. 812.4, p. 137) and was discussed at length in the Louisiana Constitutional Convention of 1974. In that Convention, delegate Patrick A. Juneau, Jr., stated his concern that the creation of the "self-executing" educational boards resulted in not three, but "four . . . branches of government". *Records of the Louisiana Constitutional Convention of 1973, Convention Transcripts;* Vol. VIII, p. 2233 (C.A. Record, Exh. P-812.4, pp. 15-16). This "public concern" over the authority of the "self-executing" educational boards was addressed by Petitioners at all levels of their state court suit.

In their state court suit, Petitioners also claimed that their faculty grievances involved property and liberty interests, triggering the procedural due process requirements of the

Louisiana and United States Constitutions. Petitioners argued that the procedure denied them the opportunity to confront witnesses against them, compel the attendance of witnesses and, in essence, provide a "fair hearing" of their grievances. Petitioners prayed that procedural due process apply to "any informal or formal grievances" conducted by the University (69a). The "public concern" regarding grievance procedures was highlighted in the 1983 Regular Session of the Louisiana Legislature by enactment of a statute guaranteeing a "fair hearing on grievances" of teachers in elementary and secondary schools. La. R. S. 17:100.4.

Petitioners believe that this is the first case where the Fifth Circuit Court of Appeals has upheld a district court's summary ruling denying constitutional protection to an employee's speech involving content of demonstrated "inherent public concern". Further, the "motive determinative" test as applied to speech involving subject matters of "inherent public concern" appears to be gaining momentum in other circuits. In *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993), the "motive determinative" test was applied by the Eleventh Circuit Court of Appeal to void protection of speech involving a a matter of "inherent public concern".

In *Morgan*, the plaintiff quit her job because three of her supervisors had subjected her to sexual harassment in the workplace. On a number of instances, plaintiff had met with her superintendent to discuss the defendants' actions toward another employee. In this meeting, plaintiff also told her superintendent about defendants' behavior toward her. Plaintiff then took her charges to the Department's Internal Affairs Division and immediately became the victim of retaliation. In upholding dismissal of plaintiff's First Amendment claims, the court noted that "sexual harassment in the workplace is a matter of important social interest". 6 F.3d at 754. Relying on the Fifth Circuit's "motive determinative" rationale, the court dismissed the social significance of the public's "great interest" in the issue and, instead, focused on whether her speech was made "primarily" as a

citizen or "primarily" in the role of an employee. (citing *Terrell, supra*). The court determined that the plaintiff's motive was "to improve her work environment" and, thus, voided the protection she should have been afforded under *Connick*.

Because the "motive determinative" test conflicts with the balancing approach adopted in *Connick* and because the test may proliferate, this Court should grant a writ to reinscribe the test intended by *Connick* and reinforce the focus on "content". This Court should reaffirm the "content determinative" test and find speech protected where any part of the communication addresses an issue of "public concern". *Hyland v. Wonder,* 972 F.2d 1129, 1137 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 2337, 124 L. Ed. 2d 248 (1993); *Barnes v. McDowell,* 848 F.2d 725, 733, n. 9, *cert. denied,* 488 U.S. 1007 (1989).

This Court should also exercise this opportunity to prevent the spread of the "motive determinative" test which will "chill" the speech of public employees. The clear language of *Connick* establishes that even speech on content of "general concern" may be protected if the employee is acting to disclose wrongdoing to the public. By affirming the "motive determinative" test, the court will send the message to public employees that the risk of speaking may well outweigh the penalty to the employee if his motive is subsequently determined to have been improper.

II.

IF MOTIVE INQUIRY IS REQUIRED UNDER *CONNICK,* THE MOTIVE ISSUE MUST GO TO THE JURY.

In its Ruling on Motions entered November 4, 1992, the district court found that "the *subject matter* of the [Petitioners] suit touches on matters of "public concern" (21a). The court further concluded that, although the content of the Petitioners speech

touched on matters of "public concern", the court was duty bound to examine the Petitioners' speech in terms of context and form to determine whether their speech rose to a level of "public concern" protected speech under the First Amendment.

In examining the context of Petitioners' state court action, the court evaluated their motive for filing suit. In scrutinizing the Petitioners' motive, the court concluded that the Petitioners had mixed motives for challenging Northeast's grievance procedures in state court. The court then stated that "when mixed motives are involved, the court must consider the primary motivation of the plaintiffs." (22a-23a), (citing *Dodds v. Childers*, 933 F.2d 271 (5th Cir. 1991). Petitioners respectfully submit that, at this juncture, the district court erred. At no time has this Court directed that the speaker's motives, an inherently fact-bound question, be scrutinized by the court.

In its Ruling on Motions, the district court cited Petitioner Grace's testimony that at least part of her motivation in filing the state court suit was to bring to the forefront of public debate, "corruption within the university and a breakdown of the faculty procedure itself." (23a). Despite this evidence of motive in the record, the district court dismissed this as a "retroactive embellishment", and granted summary judgment on the grounds that the Petitioners "presented no evidence that their *primary motivation* was to aide other faculty members or draw attention to matters beyond those involving their own personal interests." (23a). On appeal, the Fifth Circuit did not reject the district court's conclusion that the content of Petitioners' state court suit was of "public concern".

In this case, the Fifth Circuit and district court have essentially eviscerated the content prong of the *Connick* test in favor of a motive inquiry. In virtually all cases, employees may be said to speak wearing the "hat" of an employee. Thus, their motives might always be deemed personal and employment-related. This kind of

a motive test will effectively preempt First Amendment protection for state employees.

The Fifth Circuit has taken a policy statement made by this court in *Connick* and transformed the content, form and context test into a de novo review of Petitioners' motive. The Fifth Circuit uses this language to direct district courts to make a judicial inquiry into the Petitioners' motive and to justify its own de novo review of motive. This question should be reserved for the finder of fact, and is wholly unsuitable for determination on motion for summary judgment.[14] Petitioners submit that although characterized as a *holding*, this Court has not directed a judicial inquiry into speaker motive.

A. The Issue of Motive Should Go to the Jury.

If the *Connick* test requires an inquiry into motive, the issue of "public concern" presents a mixed question of fact and law that should go to the jury. It is hornbook law that motive is a question for the trier of fact, *i.e.*, jury, and an improper question to be determined by the court on a motion for summary judgment.[15]

If speaker motive is a requirement under the *Connick* test at all, the question of speaker intent or motive must be submitted to the fact finder just as the defendant's motive in taking the alleged retaliatory action is submitted to the trier of fact. Under *Mt. Healthy, supra*, once the employee has established that his or her speech is entitled to First Amendment protection, the defendant/

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14. Rule 56; Federal Rules of Civil Procedure.

15. The test for summary judgment is particularly rigorous where a disputed issue turns on a question of motive or intent; *Poller v. Columbia Broadcasting System*, 368 U.S. 424, 82 S. Ct. 486, 7 L. Ed. 2d 417 (1962); *Hardin v. Pitney-Bowes*, 451 U.S. 1008, 101 S. Ct. 2345, 68 L. Ed. 2d 861 (1981) (*J. Rehnquist, dissenting from denial of writ*). Rule 56, Federal Rules of Civil Procedure.

employer is afforded an opportunity to escape liability if it shows "by a preponderance of the evidence that [it] would have reached the same decision . . . even in the absence of the protected conduct." (Referred to as the "Mt. Healthy Defense") 429 U.S. at 287. It is settled law that the Mt. Healthy Defense[16] implicates a question of fact determined by the jury and reviewed under the clearly erroneous standard after the trial on the merits. *Duffy v. Serault,* 892 F.2d 144, 145 (1st Cir. 1989); *O'Connor v. Steeves,* 994 F.2d 905, 913 (1st Cir. 1993). It is incongruous to suggest that the defendant's motive in taking an alleged retaliatory employment action goes to the jury when the plaintiff's motive in speaking is to be determined by the judge and subject to *de novo* review after trial.

B. It Was Error to Affirm a Summary Judgment Granted on the Issue of Motive.

The district court erred in discounting the Petitioners' professed motive as a "retroactive embellishment" and granting summary judgment. In her deposition, petitioner Grace testified that one of the reasons that she filed the state court suit challenging the grievance procedures at Northeast was because she wanted to bring to light "the corruption within the university and the breakdown of the faculty procedure itself." (23a). Thus, the district court essentially made a credibility finding and granted summary judgment. This constitutes error as a matter of law.

On a motion for summary judgment, facts, and inferences drawn from the facts must be viewed in a light most favorable to the non-moving party. The non-moving party is entitled "to have the credibility of its evidence as forecast assumed, his version of all that is in dispute accepted and all internal conflict resolved favorably to him". *Miller v. Leathers,* 913 F.2d 1085, 1087 (4th Cir.

16. Whether the defendant/employer would have made the same employment decision even in the absence of the protected conduct.

1990), *cert. denied*, 498 U.S. 1109 (1991). Credibility issues are properly put to the trier of fact. *Anderson v. Liberty*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986); *Dibidale of Louisiana v. American Bank & Trust Company*, 916 F.2d 300, 307 (5th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). Furthermore, summary judgment is inappropriate where particular states of mind are decisive elements of a claim or defense. *Hardin v. Pitney-Bowes, supra*, note 18; *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990); *Dube v. State University of New York*, 900 F.2d 587, 599 (2nd Cir. 1990), *cert. denied*, *Wharton v. Dube*, 111 S. Ct. 2814 (1991).

III.

A SHOWING OF "PUBLIC CONCERN" IS NOT REQUIRED UNDER THE PETITION CLAUSE.

As previously briefed, Petitioners contend that their speech, in the form of petitioning Louisiana State courts did, as a matter of fact and law, address matters of "public concern". Nonetheless, should this Court conclude that, "as a matter of law", Petitioners' state court suit did not address matters of "public concern", Petitioners contend that the act of petitioning must, nonetheless, be afforded constitutional protection.

Petitioners have continually urged a claim under the Petition Clause of the First Amendment, separate and independent from their Free Speech claim under the First Amendment.[17] Petitioners contend that the requisite showing of "public concern" in a free

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17. Plaintiffs' opposition to defendants' post-trial Motion for Summary Judgment (C.A. Record Vol. 6, p. 2041, n. 1); plaintiffs' opposition to defendants' Motion for Partial Summary Judgment filed on 12/26/90 (C.A. Record Vol. 4, p. 1365, n. 2); Statement of plaintiffs' claims submitted prior to trial filed 11/1/89 (C.A. Record Vol.4, pp. 1066-1069, 1083-84).

speech claim is not and should not be a required element of a plaintiff's Petition Clause claim.

The Fifth Circuit Court of Appeal rejected Petitioners' argument that a Petition Clause Claim does not require a threshold showing of "public concern". In its ruling, the Fifth Circuit relied on dicta in this Court's opinion in *McDonald v. Smith*, 472 U.S. 479, 485, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985), and its earlier decision in *Day v. South Park Independent School District*, 768 F.2d 696, 701 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1985). (12a).

The plain language of the First Amendment of the United States Constitution establishes three independent and Constitutional guarantees, (1) the establishment and free exercise of religion, (2) freedom of speech and press, and (3) the right of assembly and petition.

Some of the United States Courts of Appeals have seized upon this Court's dicta in *McDonald v. Smith, supra*, and interpreted it to require a threshold showing of "public concern" in a Petition Clause case.[18] Accordingly, the acceptance of a writ in this case is necessary to give further guidance to the lower federal courts.

In *McDonald v. Smith, supra*, this Court *held* that the Petition Clause does not provide immunity to a defendant sued for expressing libelous and damaging falsehoods in petitions to

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18. **Fifth Circuit** - *Day v. South Park Independent School District*, 768 F.2d 696, 701 (5th Cir), *cert. denied*, 474 U.S. 1101 (1985); **Seventh Circuit** - *Belk v. Town of Minocqua*, 858 F.2d 1258, 1260 (7th Cir. 1988); *Gray v. Lecke*, 885 F.2d 399, 412 (7th Cir. 1989); *Griffin v. Thomas*, 929 F.2d 1210, 1212 (7th Cir. 1991) (public concern required in association case); **Eighth Circuit** - *Hoffman v. Mayor Councilmen, Citizens of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); **Tenth Circuit** - *Schalk v. Gallemore*, 906 F.2d 491, 497 (10th Cir. 1990).

government officials.[19] In dicta, this Court stated that "[t]here is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." This dicta has been used by the Fifth Circuit Court of Appeals[20] to hold that a "petition" must be on matters of "public concern" to be afforded protection under the Petition Clause. Petitioners respectfully submit that the United States Court of Appeal for the Fifth Circuit is in error in elevating the dicta in *McDonald v. Smith* to a holding that "public concern" is required in a Petition Clause claim.

In *McDonald v. Smith*, this Court held that "petitions to the President that contained *intentional and reckless falsehoods* do not enjoy Constitutional protection and may ...be reached by the law of libel". *Id.* 472 U.S. at 484, 105 S.Ct. at 2791. This Court declined to extend Petition Clause protection to a "petition to the President" because the petition was a perpetuation of reckless falsehoods. This rationale is analogous to the fraudulent or sham litigation exception to the Noerr-Pennington Doctrine. *California Motor Transport Company v. Trucking, Ltd.*, 404 U.S. 508, 92 S.Ct. 609, 30 L. Ed. 2d 642 (1972), (discussed *infra*).

A threshold showing of "public concern" has not been required by this court in Petition Clause claims involving business anti-trust cases, labor law cases or prisoner access to the courts cases. Likewise, a "public concern" showing should not be required in this case.

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19. At issue in *McDonald v. Smith* was whether the defendant could be made to defend a libel action in state court as a result of two letters which the defendant wrote to President Reagan containing false, slanderous, libelous, inflammatory and derogatory statements. The defendant argued that because he was exercising his right to petition the government, his recklessly false speech was protected by the Petition Clause of the First Amendment.

20. *Day v. South Park Independent School District*, and the other United States Courts of Appeals cited in footnote.

A. The Petition Clause in Antitrust Business Cases

In *Eastern Railroad Presidents Conference v. Noerr Motorfreight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) this Court enunciated the Noerr-Pennington Doctrine.[21] This Court applied the Noerr-Pennington Doctrine in *California Motor Transport* and found that:

> [it] would be destructive of rights of association and of *petition* to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies and the *courts* to advocate their causes and points of view respecting *resolution of their business and economic interests vis a vis their competitors.*

404 U.S. at 510, 512, 92 S. Ct. at 612.

The clear import of *California Motor Transport* is that the content, context and form of a businesses petition need not address matters of "public concern". In fact, in the antitrust context, business' right to petition the Government on purely "*business and economic interests*" is nonetheless afforded full protection under the Petition Clause of the First Amendment.

B. Labor Relations: Private Employers Receive Protection from the Petition Clause

In *Bill Johnson's Restaurant, Inc. v. N.L.R.B.*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983), this Court held that the Petition Clause protects a private employer's right to petition a

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21. The Noerr-Pennington Doctrine provides that concerted action taken by business competitors which would ordinarily violate the Sherman Act is protected by the First Amendment's Petition Clause, if the activity is directed at petitioning the government.

state court for damages for libel and injury to business reputation allegedly committed by a picketing employee. Bill Johnson's Restaurant, a private employer, filed a retaliatory state court law suit against one of its employees alleging that the employee's picketing of the restaurant was libelous and caused injury to the restaurant's business. The employee sought and received a cease and desist order from the National Labor Relations Board on the grounds that the employer's retaliatory suit constituted an unfair labor practice under the National Labor Relations Act. This court vacated the NLRB's cease and desist order holding that:

> Considering the First Amendment's right of access to the courts and [principals of federalism], we conclude that . . . [t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the [employer's] desire to retaliate against the [employee] for exercising rights protected by the [NLRA].

461 U.S. at 742-473, 103 S.Ct. at 2170.

Obviously, the employer's suit in *Johnson* did not address matters of "public concern". Rather, the restaurant's suit petitioned the state court for redress of purely private concerns, *i.e.*, libel and alleged damage to business reputation. Furthermore, the NLRB concluded as a matter of fact that the restaurant's motive for filing the suit was obviously retaliatory. Yet, this Court held that the mere act of petitioning was protected by the First Amendment of the United States Constitution.

Public employees who seek access to state courts should receive no less protection than that afforded to private employers who file lawsuits against striking employees. Because this Court refused to allow the NLRB to deny an employer's access to the

courts, it should not countenance a public employer's retaliation against a public employee who chooses to exercise his/her right to petition and access the court.

In this case, the Petitioners' access to the state court judicial system was not subject to a prior restraint as in *Johnson*. However, after filing suit, the petitioners in this case lost something much more precious. Petitioner, Grace, lost her job and Petitioner, Potts, lost his professional standing in the university. A public employer should not be allowed to retaliate with impunity simply because its employees petition a judicial system created and maintained for their benefit. "The right of access to the courts is indeed but one aspect of the right of petition". *California Motor Transport*, 404 U.S. at 510, 92 S. Ct. at 612.

C. Petition Clause Protection for Prisoners

Even prisoners are guaranteed the right to access the courts and petition the government without fear of reprisal and retaliation, "public concern" notwithstanding. This court has long protected and guaranteed the constitutional right of prisoners to petition the government for redress of grievances and to seek access to the courts.[22] The United States Courts of Appeal have meaningfully protected prisoners' rights to petition under the First Amendment by uniformly finding that prison officials may not retaliate against or harass inmates for exercising their right of petition.[23]

The courts have uniformly protected prisoners incarcerated in

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22. *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), *Johnson v. Avery*, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969); *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).

23. *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990), and cases cited therein; *Franco v. Kelly*, 854 F.2d. 584 (2nd Cir. 1988).

our nation's jails from acts of retaliation by prison officials designed to squelch a prisoner's right of access to the courts and right to petition. Obviously, the vast majority of prisoner post-conviction complaints are utterly without any aspect of "public concern". Suffice it to say that the majority of prisoner petitions are of sole interest to the petitioning inmate. Yet, the United States Constitution protects incarcerated criminals from retaliation by prison officials. This Court should not abide a reading of dicta in the *McDonald v. Smith* case to afford any less protection to a public employee.

The clear implication and practical effect of the district court's and Fifth Circuit's ruling in this case is that a public employee, one who pays taxes to support our nations judicial systems like any other citizen, may be retaliated against with impunity for filing a petition in state or federal court against his or her employer. When is a public employee to know whether or not his particular petition is of "public concern", if this issue is left to the sole discretion of the court? A public employee is asked to place his or her job, career and, livelihood on the line with the hope that, after the fact, a court scrutinizing the employee's petition will find it to be of "public concern".

The Sixth Circuit has properly recognized that a citizen's right to petition is not limited to goals that are deemed worthy and that a citizen's right to speak freely is not limited to fair comments. *Eaton v. Newport Board of Education*, 975 F.2d 292, 298 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2459 (1993). In *Eaton*, the plaintiff, a discharged school principal, sued a teacher, the teachers union and school board for unconstitutional deprivation of substantive and procedural due process. The plaintiff alleged that unfair and untruthful lobbying by the teacher and the teacher's union resulted in his termination from employment. The plaintiff received a $1 Million award in punitive damages from the defendants in the district court. The Court of Appeals reversed, finding that the actions of the teacher and the teachers union (lobbying the school

board for the principal's termination) were protected by the First Amendment and would not support an award of damages to the principal. 975 F.2d at 299. The court relied on the Noerr-Pennington Doctrine and *Johnson, supra*, to conclude that the defendant teacher and teacher's union could not be answerable in damages for exercising their right to petition an administrative body (the school board) for the discharge of the school principal. At no time in its analysis did the Sixth Circuit require that the act of petitioning the school board be deemed a matter of "public concern". To the contrary, the court stated that "a citizen's right to petition is not limited to goals that are deemed worthy." 975 F.2d at 298. Petitioners submit that the Sixth Circuit's rationale should be extended in this case and that the act of petitioning be afforded constitutional protection.

CONCLUSION

In conclusion, Petitioners respectfully request that this Court grant the Writ of Certiorari in order to (1) provide guidance to the lower federal courts regarding the proper application of the Connick Balancing Test, (2) correct the Fifth Circuit's misapplication of the Connick Balancing Test as a "motive determinative" test, and (3) define the scope of protection afforded to public employees under the Petition Clause of the First Amendment of the United States Constitution.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED OCTOBER 29, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9528

GEORGIANN L. GRACE and JAMES B. POTTS, JR.,

Plaintiffs-Appellants,

VERSUS

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana

(CA 84 414)

Before HIGGINBOTHAM, DAVIS, and SMITH, Circuit Judges.
JERRY E. SMITH, Circuit Judge:*

Plaintiffs allege that they were dismissed and demoted from their jobs as university professors in violation of their First Amendment rights. Following the grant of a new trial, the district court granted defendants' motion for summary judgment. Finding no error, we affirm.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Appendix A

I.

Plaintiff James B. Potts was and is a tenured English professor at Northeast Louisisna University (the "university") in Monroe, Louisiana. Plaintiff Georgiann Grace was hired as an untenured English instructor by Potts during a period when he served as the head of the English department; she worked at the university from Spring 1978 through Fall 1984. During this time, friction developed among plaintiffs and defendants. Defendants claim that the battle arose from plaintiffs' demands that they be granted leave from their classes in order to pursue their private consulting activities together and that they be assigned to teach certain courses of their choosing.

Grace and Potts exhausted university grievance procedures, realizing only slight success. In July 1982, they filed suit in state court, challenging the university's grievance procedures as violative of the Louisiana Administrative Procedure Act and federal and state constitutional due process guarantees. The state trial and appeal courts denied their claims, and the Louisiana Supreme Court denied certiorari. A few months after the state court suit concluded, Grace was terminated by the university, and Potts was *de facto* demoted by a pay reduction and by increased and inferior teaching assignments.

On April 18, 1984, plaintiffs filed this suit under 42 U.S.C. § 1983, claiming that their First Amendment rights were violated by the retaliatory acts of defendants in response to their allegedly protected activity, the filing of the state court suit. Defendants were a number of administrators at the university, including other English Department members and members of the initial grievance panel.

Appendix A

In the first trial in the district court, the jury answered a series of special interrogatories by finding in favor of the plaintiffs, awarding Potts $10,000 in compensatory damages and $25,000 in punitive damages. Grace was awarded $85,000 in compensatory damages.

Defendants moved for a judgment notwithstanding the verdict ("j.n.o.v."), or alternatively for a new trial. They argued for a j.n.o.v. on the ground that the district court erred as a matter of law in treating the plaintiffs' state court suit as a matter of public concern protected by the First Amendment. The district court rejected this argument, holding that the suit touched on matters of public concern.

Defendants also moved for new trial on the ground that the court erred in failing to give to the jury a requested special interrogatory on the so-called *Mt. Healthy* defense. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The court held that the defendants were prejudiced by its failure to give the requested interrogatory; thus, it granted a new trial.

At the outset of the second trial, defendants moved for summary judgment on the ground that as a matter of law plaintiffs' claims did not touch upon matters of public concern. Applying the multi-factor test established in *Connick v. Myers*, 461 U.S. 138 (1983), the district court granted defendants' motion.

Plaintiffs now appeal the district court's grant of a new trial as well as its grant of defendants' summary judgment motion. Of the initial defendants, only Vines, Morgan, snd Jeffrey remain as defendants in this suit.[1]

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1. They were the only defendants held liable In the initial jury trial.

Appendix A

II.

A.

Whether speech is protected by the First Amendment is a question of law to be determined by the court. *Rankin v. McPherson*, 483 U.S. 378, 386 n.9 (1987); *Dodds v. Childers*, 933 F.2d 271, 273 (5th Cir. 1991). The First Amendment protects a public employee from being discharged for speaking only if his speech addresses a matter of "public concern." *Dodds*, 933 F.2d at 273. If the speech does not address a matter of public concern, "a court will not scrutinize the reasons motivating a discharge that was allegedly in retaliation for that speech." *Id.* If the speech is deemed to have been on a matter of public concern, the plaintiff may recover if he can show: (1) that his interest in "commenting upon matters of public concern" outweighs the defendant's interest in "promoting the efficiency of the public services he performs," *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968), and (2) that the protected speech was a "motivating factor" in the employer's decision to fire him, *Mt. Healthy*, 429 U.S. at 287.

We review *de novo* the question of whether the speech at issue addresses a matter of public concern. *Dodds*, 933 F.2d at 273. Matters of public concern often are intertwined with private employee disputes. In such cases, the plaintiff must demonstrate that his *primary* purpose for speaking, *Dorsett v. Board of Trustees*, 940 F.2d 121, 124 (5th Cir. 1991); *Dodds v. Childers*, 933 F.2d 271, 274 (5th Cir. 1991), was "as a citizen upon matters of public concern" and not merely "as an employee upon matters of personal interest." *Connick*, 461 U.S. 138, 147 (1983). "Absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.*

Appendix A

Under *Connick*, whether an employee's speech is a matter of "public concern" is "determined by the content, form, and context of a given statement, as revealed by the whole record." *See also Ayoub v. Texas A & M Univ.*, 927 F.2d 834 (5th Cir.), *cert. denied*, 112 S. Ct. 72 (1991). Whether speech addresses a matter of public concern should be determined on a case-by-case basis. *Moore v. City of Kilgore Tex.*, 877 F.2d 364 (5th Cir.), *cert. denied*, 493 U.S. 1003 (1989).

The plaintiffs claim that the district court erred in granting defendants' summary judgment motion. They argue that the district court held that the speech touched upon a matter of public concern and thus should not have considered the motives animating their speech. In the alternative, plaintiffs argue that the court erred in deciding as a matter of law that the speech was primarily personal and thus unprotected by the First Amendment. Neither position has merit.

B.

Plaintiffs argue that the district court actually held that the speech at issue was a matter of public concern, and thus it should not have gone on to consider the motives animating the speech. In discussing the "content" prong of the *Connick* test, the district court wrote,

> The court further finds that the subject matter of the suit touches on *matters of public concern*, i.e., whether faculty grievances are conducted in a fair manner in accordance with state and federal statutory and constitutional requirements. The public naturally has an interest in ensuring that professors at state

> universities are well qualified and productive teachers. Whether or not faculty grievance procedures are conducted in accordance with law and in a fair manner may indirectly affect the quality and efficiency of the teaching staff and be of interest to the public at large.

Plaintiffs rely upon this statement as a holding that the speech was a matter of public concern and thus protected by the First Amendment.

Usually, when courts state that the speech of a government employee addressed a matter of "public concern," they mean that the content, form, and context of the speech indicate that the employee spoke as a citizen on a public issue rather than as an individual pursuing a private matter. The First Amendment protects from discharge public employees who speak as citizens. The district court, however, used the term "public concern" to describe the content of the plaintiffs' speech. The court thus employed the term in its analysis, rather than to signal its conclusion. Nevertheless, the court went on to consider the form and context of the speech, as required by *Connick*. Thus, while the court's use of language was unconventional, its reasoning was consistent with Supreme Court precedent.

The court's reasoning was also consistent with Fifth Circuit practice. In *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987), for example, this court discounted the significance of the content of the speech standing alone:

> Because almost anything that occurs within a public agency *could* be of concern to the

> public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.

Id.

Almost any issue can be reconstructed to be of interest to the public in some way; thus, this criterion provides little guidance in distinguishing public from private speech. The attenuated connection between plaintiffs' speech and the public's need for the information provided by Grace and Potts's suit illustrates the dubious value of relying upon content as the sole guide to identify what constitutes protected speech.

We focus on the "hat worn by the employee when speaking," i.e., whether he speaks as a citizen or a private employee, rather than upon the "importance" of the issue he addresses. *Gillum v. City of Kerrville. Tex.*, No. 93-8006, slip op. at 12 (5th Cir. Sept. 16, 1993). Thus, it was proper for the district court to consider Grace and Potts's motives for filing the state court suit. *See Ayoub v. Texas A & M Univ.*, 927 F.2d 834 (5th Cir. 1991).

C.

The district court applied *Connnick* and held that plaintiffs' speech did not address a matter of public concern. We review

motions for summary judgment *de novo*, and we review the evidence and any inferences drawn from it in the light most favorable to the non-moving party. *Gillum*, No. 93-8006, slip op. at 12. Reviewing plaintiffs' evidence in this light, we conclude that the district court did not err in holding that there were no genuine issues of material fact and that defendants were entitled to summary judgment as a matter of law.

Grace and Potts's claim is identical to that rejected by this court in *Dorsett*. 940 F.2d at 123. Dorsett was a university professor who claimed that he suffered retaliation for challenging university policies. The court affirmed the grant of summary judgment on the ground that his speech was not a matter of pubiic concern. The court there noted,

> The continuing retaliatory actions alleged by Dorsett appear to be nothing more than decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures. . . . [S]uch decisions might seem extremely significant to Dorsett, who has devoted his life to teaching. . . . [N]evertheless, . . . the alleged harms suffered . . . do not rise to the level of a constitutional deprivation.

Id.

Similarly, Grace and Potts have demanded leave to engage in consulting activities and the right to teach only classes of their choosing. They complain that as a result of their state court action Grace, a non-tenured instructor, was terminated, and Potts suffered a pay reduction and increased and inferior teaching assignments.

As in *Dorsett*, "[t]hese concerns are matters of private, not public, interest." *Id.* at 124.

Dorsett instructs us to be especially wary of attempting to "micromanage the administration of thousands of state educational institutions." *Id.* "Of all fields that the federal courts 'should hesitate to invade and take over, education and faculty appointments at [the university] level are probably the least suited for federal court supervision.' " *Id.* (quoting *Smith v. University of N. Car.*, 632 F.2d 316, 345 (4th Cir. 1980)). *Dorsett* concluded,

> In public schools and universities across this nation, interfaculty disputes arise daily over teaching assignments, room assignments, administrative duties, classroom equipment, teacher recognition, and a host of other relatively trivial matters. A federal court is simply not the appropriate forum in which to seek redress for such harms.

Id. at 123. We heed this warning in affirming the summary judgment.

Plaintiffs are unable to demonstrate that any issue of material fact remains as to whether they can show that their *primary* motivation in bringing their state court suit was to benefit the public, rather than to further their private dispute with the university. Thus, defendants are entitled to summary judgment as a matter of law. To reach this conclusion, we examine the content, form, and context of the speech. *Connick*, 461 U.S. at 148.

The district court found that the content of the state court suit was loosely tied to a matter of public concern: university grievance

procedures and the ability of the university to hire and retain professors. While logically relevant, the practical relationship between Grace and Potts's lawsuit and the quality of Louisiana's state university system is slight. In discussing the context of plaintiffs' speech, the district court found that they "presented no evidence that their primary motivation was to aid other faculty members or draw attention to matters beyond those involving their own personal interests."

There is some evidence that plaintiffs were not acting solely from self-interest in challenging the university grievance procedures. In her deposition, Grace testified that she filed the lawsuit because she "was speaking out on a matter that should have concerned everyone, and that was the corruption within the university and the breakdown of the faculty procedure itself." Potts also stated during the first trial that his motives were not wholly selfish.

The district court dismissed these statements as "retroactive embellishment" of plaintiffs' private claims. At best, these statements suggest that the public good was one motive animating Grace and Potts's suit. But these statements fall short of proof that would allow a reasonable jury to conclude that this was their primary motivation.

Finally, under *Connick*, we look at the form of the speech. Bringing suit in state court is unquestionably the availment of a public setting. Stating private demands in a public setting, however, does not automatically convert the private grievance into a matter of public concern. *See Caine v. Hardy*, 943 F.2d 1406, 1416 (5th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1474 (1992) ("context alone cannot transform an inherently self interested opinion into one that implicates public issues. Had [plaintiff]

proclaimed his opposition to [defendant] . . . from the steps of the Mississippi capitol, the characterization of this speech would not differ.").

The district court held that the "activity sought to be protected [was] the pursuit of the lawsuit as opposed to any specific testimony elicited therein." There is no evidence that the availment of a public setting was anything but incidental to the pursuit of private demands.

The content, form, and context of plaintiffs' speech indicate that theirs was nothing more than a private dispute with their employer, which coincidentally happened to be a state university. Under the facts of their case, no constitutional concerns are implicated: "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." *Connick*, 461 U.S. at 147.

III.

Plaintiffs argue that even if their state court suit is not protected by the freedom of speech provisions of the First Amendment, they have a claim under that amendment's petition clause.[2] They contend that the clauses protect distinct behavior and that the public concern requirement limiting invocation of the free speech clause should not apply to the petition clause. This argument is meritless.

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2. It is uncertain whether plaintiffs even properly raised this claim in the district court, as the district court did not discuss the petition clause in granting summary judgment.

Appendix A

The First Amendment guarantees three distinct rights: Congress shall make no law [i] respecting an establishment of religion, or prohibiting the free exercise thereof; [ii] or abridging the freedom of speech or of the press; [iii] or the right of the people peaceably to assemble and to petition the Government for a redress of grievances. U.S. CONST. AMEND. I. Plaintiffs argue that each clause should be construed independently from the others. More specifically, they argue that the public concern showing required to invoke free speech protection should not apply to the petition clause. The defendants respond that the petition clause has been interpreted identically to the speech clause, and thus a showing of public concern should be required.

There is no support in authority or in logic for construing the petition clause more broadly than the speech clause. The Supreme Court stated this unequivocally in *McDonald v. Smith:*

> To accept petitioner's claim . . . would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions.

472 U.S. 479, 485 (1985). Similarly, in *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 701 (5th Cir.), *cert. denied*, 474 U.S. 1101 (1985), this court explicitly rejected the claim that matters of private concern, whether raised as speech or petition claims, are protected by the First Amendment's shield.

In this case, the speech and petition acts are the same: the filing of the state court suit. For the reasons identified in rejecting plaintiffs' free speech claim, we conclude that their claim under the petition clause does not address a matter of public concern; thus, summary judgment on this ground was proper.

IV.

Following a verdict for plaintiffs, the district court granted the defendants' motion for a new trial on the ground that the failure to give a requested special interrogatory confused the jury and prejudiced defendants. Plaintiffs contend that granting this motion was an abuse of discretion.

At trial, defendants requested a jury interrogatory "asking in effect: In the event that you find that the prosecution of the lawsuit was a motivating factor [in the adverse employment decision], then do you find that defendants would have taken the same action anyway?" This instruction is known as the *Mt. Healthy* defense. *Mt. Healthy*, 429 F.2d at 287.

Under FED. R. CIV. P. 59, the court may grant a new trial based upon its appraisal of the fairness of the trial and the reliability of the jury's verdict. A new trial may be granted if the court finds that the trial was unfair or marred by prejudicial error. *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985). A motion for new trial may also be granted for substantial errors of law in the admission or rejection of evidence or the giving or refusal of instructions. Challenges made to special jury interrogatories are considered in context with the surrounding circumstances, including the court's instructions to the jury. *Winter v. Brenner Tank. Inc.*, 926 F.2d 468, 472 (5th Cir. 1991).

Appendix A

The court charged the jury that "[t]he plaintiff[s] must prove that the exercise of the First Amendment right was a substantial motivating cause in the employment decision, and that the employment decision would not otherwise have been made."[3] Despite instructing the jury correctly, the district court granted defendants' motion for a new trial on the ground that the special interrogatories failed fully to consider the *Mt. Healthy* defense.

The judge gave the jury the following interrogatories. For Potts, the interrogatory read, "Do you find that prosecution of a lawsuit by plaintiff Potts in state court against Northeast Louisiana University was a substantial or motivating factor in the decision of *any* defendant to levy a *de facto* demotion upon plaintiff James Potts?" Similarly, for Grace the interrogatory read, "Do you find that a substantial or motivating factor in the decision not to rehire plaintiff Georgiann Grace was Grace's prosecution of a lawsuit against Northeast Louisiana university in state court?"

The interrogatories failed to ask the jury whether the adverse employment decision would have been made notwithstanding the protected speeeh. Asking whether the speech was a factor in the adverse employment decision does not force the jury to consider whether other factors would have led the university to the same conclusion. For example, the protected speech may be redundant to other reasons behind the adverse employment decision. The court was within its discretion to decide that the special interrogatories did not "match" the jury instructions, prejudicing the defendants.

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3. This instruction actually misstates the *Mt. Healthy* rule. Under *Mt. Healthy*, defendants bear the burden to show that they would have taken the adverse employment action independently of the protected speech.

Appendix A

Plaintiffs rely upon two cases to support their claim that the district court exceeded its discretion in granting defendants' motion for a new trial: *Winter v. Brenner Tank and Kemp v. Ervin*, 651 F. Supp. 495 (N.D. Ga. 1986). In *Winter*, the court held that proper jury instructions could correct errors in an interrogatory. *Winter*, 926 F.2d at 472. In *Winter*, however, the court gave additional instructions on the specific interrogatory in issue, and the jury manifested its understanding of the issues. *Id.* Thus, there was no reason to believe that the jury was confused by the erroneous interrogatory. In the current case, however, the court did not supplement its original instructions in order to alleviate confusion, nor did the jury manifest any understanding of the relationship between the interrogatories and the court's instructions.

Second, plaintiffs argue that this case is analogous to *Kemp*, 651 F. Supp. at 502. This analogy is flawed. The defendants in *Kemp* argued that the *Mt. Healthy* test was withdrawn from the jury by a failure to provide interrogatories consistent with the jury instructions.

Grace contends that *Kemp* rejected defendant's claim "because the jury was fully charged in a manner which comported with the requirements of *Mt. Healthy*." But the court in *Kemp* also denied the motion because it concluded that the language of the interrogatories, standing alone, was sufficient to require the jury to consider the *Mt. Healthy* defense. *Id.* Accordingly, the district court did not abuse its discretion in granting a new trial on the ground that the special interrogatories did not fully instruct the jury on the *Mt. Healthy* defense, thereby confusing the jury and prejudicing the defendants.

Appendix A

V.

In summary, the plaintiffs challenge to the university grievance procedure does not address a matter of public concern. The Constitution does not require this court to intervene in private employee disputes. The summary judgment is AFFIRMED.

APPENDIX B — RULING ON MOTIONS FILED NOVEMBER 2, 1992

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 84-414-A

GEORGIANN L. GRACE, ET AL

VERSUS

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, ET AL

RULING ON MOTIONS

This matter is before the court on motions by defendants for summary judgment, for judgment on the pleadings, and to prohibit plaintiffs from introducing certain evidence at trial. All of the motions are opposed. There is no need for oral argument.

The court has granted defendants, Dwight Vines, Frank Morgan, and David Jeffrey[1], a new trial on the claims made by plaintiffs, Georgiann Grace and James Potts, under the First Amendment to the Constitution. Essentially, plaintiffs claim that defendants were instrumental in causing Grace's contract as an instructor at Northeast Louisiana University to not be renewed and in effectively demoting Potts in connection with his employment

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1. Dr. Vines was the President of Northeast Louisiana University; Dr. Jeffrey was the head of the English Department and Dr. Morgan was the Dean of the College of Liberal Arts.

as a tenured professor at the University. Plaintiffs claim that defendants acted in retaliation for plaintiffs having pursued legal proceedings in state court challenging the University's procedures for handling faculty grievances. See *Grace v. Board of Trustees for State Colleges and Universities*, 442 So.2d 598 (La. App. 1 Cir. 1983), writ denied, 444 So.2d 1223 (La. 1984).

In support of their motion for summary judgment, defendants argue that the state court action by plaintiffs did not involve a "matter of public concern" protected by the First Amendment. Defendants argue that plaintiffs acted primarily in furtherance of their own personal interests in connection with employee grievances that they were pursuing at the time rather than seeking to rectify the grievance procedures in general. Alternatively, defendants argue that, even if the lawsuit did raise a matter of public concern relating to faculty grievance procedures, plaintiffs have no evidence that defendants acted in retaliation for the public concern aspects of the lawsuit, i.e. the procedural challenges, as opposed to the pursuit of their individual grievances.

In opposition to the motion for summary judgment, plaintiffs argue that their motivation is just one factor to consider and that the court should conclude, based upon the content, form and context of their state court pleadings as a whole, that plaintiffs raised matters of public concern. In connection with the alleged retaliation by defendants, plaintiffs contend that it is sufficient to show that defendants acted because of the lawsuit generally without having to specifically tie their actions to the "public concerns aspects" of that action.

Whether or not a public employee's speech addresses a matter of public concern is a question of law to be resolved by the court rather than the jury. *Dodds v. Childers*, 933 F.2d 271 (5th Cir.

1991); *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), cert. denied, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987). Additionally, it is well established that the employee bears the burden of demonstrating that his speech addresses a matter of public concern. *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).

Our analysis begins with the basic premise that federal courts are courts of limited jurisdiction and that not every wrong or injustice which occurs within a public agency amounts to a constitutional violation. In *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the Supreme Court stated:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.
> 103 S.Ct. at 1690.

The Court further observed that:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be

> receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.
> 103 S.Ct. at 1691.

In *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), the Fifth Circuit has likewise recognized that:

> Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interests or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.
> 792 F.2d at 1362 (footnotes omitted).

In determining whether the plaintiff is acting primarily as a citizen or as an employee, the court must consider "the content, form, and context of a given statement, as revealed by the whole record." *Connick*, supra, 103 S.Ct. at 1690; *Ayoub v. Texas A&M University*, 927 F.2d 834 (5th Cir. 1991), cert. denied, __ U.S. __, 112 S.Ct. 72, 116 L.Ed.2d 46 (1991). In other words, "the content, form and context must be considered as a whole package, and the significance of these factors will differ depending on the

circumstances of the particular situation." *Moore v. City of Kilgore, Tex.*, 877 F.2d 364 (5th Cir. 1989), cert. denied, 493 U.S. 1003, 110 S.Ct. 562, 107 L.Ed.2d 557 (1989). The court examines "the content, form and context" to determine whether the plaintiff spoke as an employee or as a citizen.

Turning first to the "content" of the state court pleadings, the court finds that it pertains to certain grievances filed by plaintiffs addressing matters of personal interest such as teaching assignments, leaves of absences and merit raises. The court further finds that the subject matter of the suit touches on matters of public concern, i.e. whether faculty grievances are conducted in a fair manner in accordance with state and federal statutory and constitutional requirements.[2] The public naturally has an interest in ensuring that professors at state universities are well qualified and productive teachers. Whether or not faculty grievance procedures are conducted in accordance with law and in a fair manner may indirectly affect the quality and efficiency of the teaching staff and be of interest to the public at large. However, as noted in the *Terrell* case, supra, the fact that the topic concerns a matter of interest to the public, standing alone, is of little moment. The suit addressed matters of personal interest as well and the court must consider the "whole package" to determine the motivation of plaintiffs in challenging the procedures.

The court next examines the context in which plaintiffs filed

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2. Plaintiffs sought a declaratory judgment that the University and the Faculty Appeals Committee were subject to the provisions of the Louisiana Administrative Procedure Act, La. R.S. 49: 951, et seq. They further asserted that there had been no lawful delegation of authority to conduct grievance hearings from the Board of Trustees of State Colleges and Universities to the Faculty Appeals Committee and the University and that their due process rights under the state and federal constitutions had been violated.

the state court action. The state court petition, as amended, obviously was filed to obtain relief vis a vis the specific grievances filed by plaintiffs under the faculty appeals procedure.[3] However, speech may be a matter of public concern despite the "existence of an element of personal interest." *Dodds v. Childers*, 933 F.2d 271 (5th Cir. 1991).

Plaintiffs claim that they had mixed motives in challenging the grievance procedures. When mixed motives are involved, the court must consider the primary motivation of the plaintiffs. *Dodds*, supra. At the trial in this court, Potts testified that the lawsuit was filed because they "wanted to understand the procedure." He further explained that:

> We don't know what due process means, but it seemed to us there should be a fair forum for us to be able to find out. It was our opinion that we

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3. In their state court petition as amended, plaintiffs sought to stay their employment grievances pending a judgment declaring that the provisions of the Administrative Procedure Act applied to "formal, informal procedures and adjudications in any hearing before these defendants *on issues raised herein.*" Alteratively, plaintiffs requested recognition that their property and liberty interests under the state and federal constitutions be recognized and that defendants be required "to afford procedural due process to these petitioners in any informal or formal grievance proceeding hereafter had". In the further alternative, plaintiffs asked that the faculty appeal procedures at the University be declared unconstitutional because the Board of Trustees for State Colleges and Universities had not authorized defendants to conduct grievances. Additionally, plaintiffs requested a declaration "that *petitioners are not required to undergo or participate in the Faculty Appeals Procedure* prior to exercising any other form of redress at law". Both *plaintiffs specifically prayed that their prior grievance procedures be invalidated* based on due process grounds. Thus, an overall reading of the state court petition, as amended, reveals that plaintiffs were primarily interested in furthering their individual grievances with the University.

> should be given the opportunity to respond, to get documents, so it would come out with a legitimate finding and an understanding or what was involved in that procedure. We never got that.
> Trial Tr. at p. 341.

In her deposition, Grace testified that she filed the lawsuit "because I was speaking out on a matter that should have concerned everyone, and that was the corruption within the university and the breakdown of the faculty procedure itself." This is plainly a "retroactive embellishment" of little value in determining the First Amendment claim. *Dodds,* supra at 274. Moreover, it is not even a fair characterization of the nature of the state court proceedings which plaintiffs initiated.

Plaintiffs have presented no evidence that their primary motivation was to aid other faculty members or draw attention to matters beyond those involving their own personal interests. Cf. *Thompson v. City of Starkville, Miss.*, 901 F.2d 456 (5th Cir. 1990) (involving allegations of widespread misbehavior within the public police force; the plaintiff had little to gain personally by his grievance and had aided others in filing similar complaints); *Gonzalez v. Benavides*, 774 F.2d 1295 (5th Cir. 1985), cert. denied, 475 U.S. 1140, 106 S.Ct. 1789, 90 L.Ed.2d 335 (1986) (involving significant matters of public concern including the possibility that thousands of needy residents might have been deprived of a million dollars a year in federal assistance as the result of employment procedures challenged by plaintiff).

Finally, the court considers the form of the activity at issue in this case. There is no doubt that legal proceedings are public. However, the fact that plaintiffs availed themselves of the state

court process is not in and of itself determinative. *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989); *Brinkmeyer v. Thrall Independent School Dist.*, 786 F.2d 1291 (5th Cir. 1986).

The fact that a public employee chooses a public forum in which to state his essentially private concerns does not convert the private grievance into a matter of public concern. See *Copsey v. Swearingen*, 790 F.Supp. 118, 123 (M.D. La. 1982) (interview broadcast on television news not sufficient to convert a private grievance into a public concern); *Caine v. Hardy*, 943 F.2d 1406, 1416 (5th Cir. 1991) (en banc) ("... context alone cannot transform an inherently self-interested opinion into one that implicates public issues. Had [plaintiff] proclaimed his opposition to [defendant] ... from the steps of the Mississippi capitol, the characterization of this speech would not differ.")

When First Amendment protection is sought in connection with prior legal proceedings, the context of the speech may be quite significant, as shown by the two cases discussed below. In *Rathjen*, supra, the plaintiff was demoted from her position as Assistant Director of Personnel with the City of Houston. She claimed that defendant Litchfield inaccurately evaluated her job performance because she opposed a "voluntary" demotion by Litchfield and she filed a lawsuit. The Fifth Circuit observed that "[t]he law is no different where the act which allegedly gave rise to the retaliation claim is the filing of a grievance or a lawsuit. Id. at 842. The court held that Rathjen's actions in opposing her demotion and filing the lawsuit related only to her supervisor's employment decisions and were not a matter of public concern.

In *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989), cert. denied, 493 U.S. 1019, 110 S.Ct. 718, 107 L.Ed.2d 738 (1990), the plaintiff testified in a Commissioner's

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Court on behalf of a co-worker in support of an Equal Employment Opportunity charge made by the co-worker against their employer, the Harris County Flood Control District. Johnston claimed that he was eventually terminated because his testimony was unfavorable and embarrassing to the employer. While the content of the testimony involved merely a personnel dispute, the Fifth Circuit found that the context, i.e. giving testimony before an official government adjudicatory body, was sufficient to elevate it to a matter of public concern. The Fifth Circuit concluded as a policy matter that allowing retaliation might chill the employee's willingness to testify, thereby impeding the court's goal of gathering facts and arriving at the truth.[4]

In this case, plaintiffs were not acting as disinterested witnesses. The situation at hand is more akin to that in *Rathjen*. The activity sought to be protected is the pursuit of the lawsuit as opposed to any specific testimony elicited therein. Indeed, the opinion of the state appellate court reflects that the case was decided on cross motions for summary judgment and chiefly involved matters of statutory construction[5].

After consideration of the "content, form and context," the court concludes that plaintiffs were acting primarily as employees

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4. See also, *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096 (5th Cir. 1987)(finding testimony of witness protected by First Amendment, although neutral in content, based upon policy of protecting truthful testimony).

5. The Louisiana First Circuit Court of Appeal found that the State Board of Trustees was vested under the state constitution with the authority to adopt rules and regulations governing internal management of universities without legislative approval or consent. 442 So.2d 598, 601. The court further held that the Administrative Procedure Act was inapplicable to faculty grievance procedures by its own terms and that plaintiffs made no cognizable due process claims.

rather than citizens. The overall content of the state court pleadings and the context in which those proceedings took place make it quite clear that plaintiffs spoke primarily as disgruntled employees pushing their personal grievances rather than informed citizens seeking to improve the system and the University in general. The fact that plaintiffs used a public forum as a means of accomplishing their personal goals does not transform this into a matter a public concern. Similarly, the fact that their legal arguments might have coincidentally been of benefit to other faculty members or of interest to the public at large is overshadowed by the court's finding, after sitting through the trial in this matter, that their actual purpose in prosecuting the State lawsuit was undoubtedly to further their personal dispute with certain officials at the University.

Plaintiffs correctly point out that defendants have only recently focused on the public concern issues in this longstanding litigation, having ignored or glossed over the issue for years and through a succession of lawyers. That is certainly regrettable since much time and expense might have been saved had the issue been vigorously pursued at an earlier date. That fact, however, does not detract from the force of the argument now presented and, since the issue is one to be resolved by the court rather than the jury, e.g., *Dodds v. Childers,* 933 F.2d 271 (Sth Cir. 1991), it may be appropriately raised, even at this late date.

For these reasons, the motion by defendants for summary judgment is hereby GRANTED and this action will be dismissed.

Baton Rouge, Louisiana, November 2, 1992.

s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C — EXCERPTS OF ORIGINAL BRIEF ON BEHALF OF GEORGIANN L. GRACE AND JAMES B. POTTS, JR., PLAINTIFFS-APPELLANTS FILED FEBRUARY 28, 1983

COURT OF APPEALS

FIRST CIRCUIT

STATE OF LOUISIANA

DOCKET NUMBER 83 CA 0145

GEORGIANN L. GRACE and JAMES B. POTTS, JR.,

Plaintiffs-Appellants

VERSUS

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, ET AL

Defendants-Appellees.

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
HON. DOUGLAS M. GONZALES, JUDGE PRESIDING
DIVISION "L"

ORIGINAL BRIEF ON BEHALF OF
GEORGIANN L. GRACE AND JAMES B. POTTS, JR.
PLAINTIFFS-APPELLANTS

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* * *

III. *ASSIGNMENT OF ERRORS AND ISSUES PRESENTED FOR REVIEW*

A. THE TRIAL COURT ERRED IN FAILING TO FIND THAT HEARINGS UNDER THE NORTHEAST LOUISIANA UNIVERSITY FACULTY APPEALS PROCEDURE MUST BE HELD IN COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURE ACT, L.R.S. 49:951, *ET SEQ.*

The procedure before administrative agencies, boards,

commissions, departments or other entities is prescribed by the Administrative Procedure Act, R.S. 49:951, et seq. Section 951 of that Act identifies those entities which are subject to the provisions of the Administrative Procedure Act. The applicable provisions of Section 951 provide as follows:

> § 951. *Definitions*
>
> As used in this Chapter:
>
> (1) "Adjudication" means agency process for the formulation of a decision order.
>
> (2) "Agency" means each state board, commission, department, agency, officer, or other entity which makes rules, regulations, or policy, or formulates, or issues decisions or orders pursuant to, or as directed by, or in implementation of the constitution or laws of the United States or the constitution and statutes of Louisiana, . . .
>
> (3) "Decision" or "order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency, in any matter other than rulemaking required by constitution or statute to be determined on the record after notice and opportunity for an agency hearing . . .

* * *

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(6) "Rule" means each agency statement, guide, or requirement for conduct or action exclusive of those regulating only the internal management of the agency, which has general applicability and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency. "Rule" includes, but is not limited to, any provision for fees, fines, prices or penalties, the attainment or loss of preferential status, and the criteria or qualifications for licensure or certification by an agency. A rule may be of general applicability even though it may not apply to the entire state, provided its form is general and it is capable of being applied to every member of an identifiable class. The term includes the amendment or repeal of an existing rule but does not include declaratory rulings or orders.

(7) "Rule-making" means the process employed by an agency for the formulation of a rule. The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts involved does not render the same a rule within this definition or constitute specific adoption thereof by the agency so as to be required to be issued and filed as provided in this Subsection.

Under the legislative and constitutional grants of authority to

the Board of Trustees, the Board of Trustees handles grievance proceedings involving university personnel under its jurisdiction. This is clearly set forth in the By-Laws of the Board of Trustees, Article C, Part 1, Section b(4). *Louisiana Register*, Vol. 1, No. 12, (December 20, 1975), page 526 *et seq*. Although the Grievance Committee of the Board of Trustees has no written rules or regulations for conduct of grievance hearings, it is the position of the Board of Trustees that the university or college employee is required to exhaust the college or university remedies before a hearing or appeal will be, considered by the Board of Trustees. Upon the decision to grant such an appeal, the Board of Trustees is governed by facts developed at earlier hearings at the college or university level.

Under Section 951(2), the Board of Trustees is a state board which "makes rules, regulations, or policy," or "formulates, or issues" decisions or orders "pursuant to the constitution and laws of Louisiana." The mere fact that a grievance procedure exists as a method of handling employee grievances is evidence that the Board of Trustees considers itself "enabled" or "authorized" to hold such hearings. Further, this process is an "adjudication" which entails formulation of a decision or order.

By process of delegation, the Board of Trustees authorizes universities such as Northeast Louisiana University to enact and employ a faculty appeal procedure such as that described at page 35 of the Northeast Louisiana University Faculty Handbook. Because of this delegation and the position of the Board of Trustees that university hearings are "fact-finding" hearings, the entity, agency or officer thereof to whom this authority is entrusted must comply with the Administrative Procedure Act. It would be illogical to assume that the Board of Trustees could delegate the authority for such "fact-finding" hearings and avoid

implementation of the Administrative Procedure Act.

An issue raised in the trial court was the self-executing nature of the constitutional provisions creating powers and authorities of the Board of Trustees for State Colleges and Universities, and, thus, the power of the legislature to implement those powers by legislation such as the Administrative Procedure Act. Plaintiffs-appellants are aware of a number of cases dealing with self-executing provisions of the Louisiana Constitution. In the case of *Student Government Association of L.S.U., etc. v. Board of Supervisors*, 264 So. 2d 916 (La., 1972), the Student Government Association of Louisiana State University filed an action for Declaratory Judgment asking the court to override a university regulation providing for a parking fine in excess of that provided by a state statute. In upholding the fine imposed by the Board of Supervisors, the Louisiana Supreme Court reviewed the history of the constitutional article creating the Board of Supervisors. The court found that the power of "direction, control, supervision and management" bestowed upon the Board of Supervisors included the power to adopt and to enforce, administratively, reasonable regulations governing the on-campus activity and conduct of faculty, employees, and students. However, the decision clearly points out that only the narrow issue in the case was decided and that it was limited to the constitutional authority to administer the relationship and activities of students *on the university campus*, *supra*, page 917.

Subsequent decisions have dealt with other self-executing provisions of the Louisiana Constitution of 1974 and their effect. *Consumer League, Inc. v. Louisiana Public Service Commission*, 351 So.2d 128 (La.1977), (rulemaking authority of the Louisiana Public Service Commission); *Board of Elementary and Secondary Education v. Kelly Nix*, 347 So.2d 147 (La. 1977), (constitutional authority in relation to supervision, control and budgetary

costraints of the Board of Second Education.

However, none of these cases specifically addressed the application of the Administrative Procedure Act to "self-executed" bodies in an "adjudication". In *Hagood v. Pickering*, 385 So.2d 405 (La. App. 1st Cir. 1980), this Honorable Court correctly established that the provisions of the Administrative Procedures Act would apply if a hearing was required by the due process clauses of the Louisiana and federal Constitutions, *supra*, page 408. Thus, should this court find a state or federally protected constitutional right, implementation of the "due process" provisions of these constitutions would require an Administrative Procedure Act hearing. In coordinating these hearing procedures with a "self-executing" body, the court would not be imposing upon substantive rights of the body, but would be merely implementing a procedure dictated by a coordinate provision of the Louisiana or federal Constitution. This very issue has been a addressed by the Supreme Court of Kansas in the case of *State v. Board of Education of Unified School District No. 398, Marion County*, 511 P.2d 705 (Kansas 1973), copy attached TAB 6. The Kansas Supreme Court recognized the interrelationship of self-executing bodies and other constitutional or statutory provisions in the following language:

> ". . . . The general rule, as we understand it to be, is that even when a constitutional provision is self-executing, the legislature may enact legislation to facilitate or assist in its operation, but that whatever legislation is adopted must be in harmony with the provisions of the constitution. page 711."

Thus, regardless of the "self-executing" character of the

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Board of Trustees for State Colleges and Universities, these "self-executing" bodies should be guided in furtherance of their duties by other constitutional provisions and statutes. In view of the *Hagood v. Pickering*, case, *supra*, this court should recognize that the implementation of the Administrative Procedures Act to further the due process article of the Louisiana Constitution must apply to all constitutional and statutory bodies.

If the "self-executing" bodies are not subject to subsequent legislation, these bodies will, no doubt, argue exemption from the Public Records Act, L.R.S. 44:1 *et seq.*, Code of Governmental Ethics, L.R.S. 42:1101 *et seq.* and Open Meetings Law, L.R.S. 42:1 *et seq.* Such an argument is untenable and unhealthy.

Plaintiffs-appellants are also aware of recent cases contruing the application of the Administrative Procedure Act to an adjudication. In the case *Hagood v. Pickering*, 385 So.2d 405 (La. App. 1st Cir. 1980), the Louisiana First Circuit Court of Appeal determined that the Administrative Procedure Act does not create an independent right to a hearing. This act merely sets forth the procedures to be used if the agency is obligated to hold a hearing by constitution or statute.

In the case of *Delta Bank & Trust Co. v. Lassiter*, 383 So.2d 330 (La. 1980), decided on the docket of this Honorable Court, the Louisiana Supreme Court confirmed that a hearing was an "adjudication" only when agency action is one for the formulation of a "decision or order". "Decision or order" dealt with matters other than rulemaking required by the constitution or statute to be determined *on the record* after notice and opportunity for an agency hearing. The court also reiterated that unless there is a provision in the constitution or statues requiring a hearing, an agency disposition is not a "decision or order" as defined for purposes of the Act.

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Plaintiffs-appellants urge that the *Hagood* and *Delta Bank* cases are supportive of their position rather than adverse. In their motion for summary judgment, defendants argued that the power to conduct grievance proceedings at both the university and Board of Trustees level are constitutionally mandated and implemented by R.S. 17:3351. If it is assumed that such authority exists by virtue of *statute*, and that, in the implementation of this authority, defendants have created a mandatory grievance proceeding, the employee is bound by a mandatory grievance procedure mandated by a statute. The entire intention of the Administrative Procedure Act would be circumvented if defendants were allowed to deny its application by claiming authority to hold hearings, but deny Administrative Procedure Act responsibility because no statute existed spelling out specifically the terms of the hearing. Inclusion of the mandatory procedure and holding such hearings *on the record* are legally no different than a specific statute requiring such a format. It is plaintiffs' contention that this appeals procedure is "required by a statue" to be determined "on the record" after notice and hearing. Mere review of Exhibit of G-9 (transcript of tape recorded hearing), Exhibits G-20 and G-30 exemplify that these hearings are had *on the record* pursuant to some statutory authority. Thus, the hearings held in the Northeast Louisiana University Faculty Appeals Procedure are "adjudications" within the meaning of the Administrative Procedures Act and should be held in compliance with the procedural guidelines of that Act.

B. THE TRIAL COURT ERRED IN NOT RECOGNIZING PLAINTIFFS-APPELLANTS' PROPERTY RIGHTS OR LIBERTY INTEREST TRIGGERING THE PROCEDURAL DUE PROCESS REQUIREMENTS OF THE LOUISIANA AND UNITED STATES CONSTITUTIONS.

In addition to the clear terminology of the Administrative Procedure Act and the enabling legislation governing activities of

the Board of Trustees, plaintiffs-appellants have also shown the existence of property rights or liberty interests cognizable under Article I, Section 2 of the Louisiana Constitution of 1974 and the Fourteenth Amendment to the Constitution of the United States. These authorities provide as follows:

> *Louisiana Constitution of 1974.* Article I, Section 2. No person shall be deprived of life, liberty, or property, except by due process of law.
>
> *United States Constitution, XIV Amendment.* Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The "due process" clause of the Louisiana Constitution of 1974 seems to incorporate both substantive due process and procedural due process requirements of the V and XIV Amendments to the United States Constitution. Cases construing "property rights" and "liberty interests" under the Louisiana Constitution cite federal authority in construction of similar constitutional guidelines. In the case of *Hagood v. Pickering*, 385 So.2d 405 (La. App. 1st Cir. 1980), the appellate court recognized a potential "liberty interest" in damage to reputation in the community. The court further cited the case of *Board of Regents of*

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State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), and the language therein setting forth "property rights or interests" protected by constitutional guarantees. That court stated as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Due process requires that one be apprised of the charges or complaints and be given a fair opportunity to defend by confronting the witnesses against him. *White v. Board of Supervisors of Southern University*, 365 So.2d 583 (La. App. 1st Cir. 1978). In the case of an agency or board subject to the Administrative Procedure Act, the Louisiana First Circuit Court of

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Appeal equates a "due process" hearing with the requirements of the Administrative Procedure Act. *Hagood v. Pickering*, id. at page 409.

Further clarification of recognized "property interests" and "liberty interests" is had by review of the applicable federal cases. The very nature of the faculty grievance procedure has been recognized by the United States Supreme Court as a "...*remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Delaware State College v. Ricks*, 449 U.S. 250, 261, 101 S. Ct. 498, 66 L.Ed.2d __, (Oct. Term 1980).

1. Property Interest.

Because of employment of the faculty grievance procedure, the property interests of plaintiff-appellant, Georgiann L. Grace, have been affected in the following respects:

(1) Retention of salary earned in the amount of $217.92 because of leave required to be taken by her Department Head.

(2) Personal financial loss in incurring costs to develop expertise sufficient to teach technical writing;

(3) Inadequate salary adjustment for the year 1981-1982; and

(4) Removal from the English Department's technical writing program where "entitlement" to teach courses in the program was established by fulfillment of requirements of her academic dean and department head;

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(5) Restrictions on consulting and other forms of professional development inconsistent with those imposed on other members of the English faculty and other faculties of Northeast Louisiana University.

The property interests of plaintiff-appellant James B. Potts, Jr. are as follows:

(1) Retention of salary earned in the amount of $217.92 because of leave required to be taken by his Department Head.

(2) denial of salary increases commensurate with rank, tenure, and contributions to the university.

(3) denial of permission for travel for professional growth and development,

The petition and answer filed in this matter establish that plaintiffs-appellants were hired under teaching contract for the 1980-1981 and 1981-1982 school years. There is no dispute that the contracts for these years were nine-month contracts. Exhibits attached to the original petition confirm that the teaching contracts were for a fixed term of nine months. Section 7.13 of the Policies and Procedures Manual of the Board of Trustees establishes compensation rates on a nine-month college rate basis. *Louisiana Register*, Vol. 1, Number 12 (December 20, 1975) page 526 *et seq.* The salaries are computed on an annual nine-month basis rather than monthly salary. Benefits such as sick leave, annual leave and other forms of remuneration are contained throughout the Policies and Procedures Manual of the Board of Trustees and are further

incorporated in the Faculty Handbook. Thus, plaintiffs-appellants, Georgiann L. Grace and James B. Potts, Jr., have a property interest in their annual contract and benefits during the term of such contract.

Under Louisiana law, an employee who is dismissed during a contract for services for a fixed period of time is entitled to that salary stated for the entire period of the contract. *Jackson v. East Baton Rouge Parish School Board*, 393 So.2d 243 (La. App. 1st Cir. 1980), L.C.C. Art. 2749. Hence, were an employee under a contract for a fixed term discharged during that term, he would be entitled to all salary and benefits inuring to his benefit had he continued to be so employed. Such a right establishes a "property interest" under Louisiana law.

Plaintiff-appellant, Georgiann L. Grace, has established a claim to "entitlement" to teaching courses in the Technical Writing Program at Northeast Louisiana University. Her affidavit sets forth that, pursuant to the advise of her Department Head and Academic Dean, she understood steps, at her own expense, to establish credentials in the field of Technical Writing. She was included in the program at its inception, but was removed from the program despite having established an "entitlement" to teach.

Having established credentials to teach and having been relied upon in development of the degree proposal for Technical Writing itself, plaintiff-appellant, Georgiann L. Grace, has established more than a "unilateral expectation" of teaching. Her very inclusion as a teacher at the inception of the program supports a claim of entitlement to that position. *Board of Regents of State Colleges v. Roth, supra.*

In the case of *Doran v. Houle*, 516 F.Supp. 1231 (U.S. Dist. Ct.

Montana, 1981), two veterinarians brought suit against the U.S. Department of Agriculture and as administrator of the Montana Department of Livestock claiming "entitlement" to testing kits used in their veterinary practice. The plaintiff veterinarians had been issued yearly permits by the Federal Government for use of the test kits which were the exclusive property of the Federal Government. Without notice of hearing, the administrator of the Montana Department of Livestock revoked plaintiffs' authority to perform the test. Plaintiffs claimed "entitlement" because the removal of the permit effectively destroyed their livestock yard practice. In considering the issue of "expectation of entitlement", the court found a protectable property interest in continued right to use the test. The court further held that considerations of basic fairness required that plaintiffs be notified of the pending revocation and given an opportunity to present evidence in rebuttal.

Plaintiffs, Georgiann L. Grace and James B. Potts, Jr., have been deprived of a property interest without due process in the mere act of withholding salary because of attendance at a professional conference. This act alone establishes a sufficient property interest to require a procedural due process hearing before deprivation. However, their property interests go even further in that they are being deprived *during the contract term* of benefits and "entitlement" clearly set forth in the regulations of the Board of Trustees and Northeast Louisiana University Handbook. Thus, the court should require a due process hearing before deprivation of these property interests.

2. Liberty Interests.

Plaintiffs-appellants, Georgiann L. Grace and James B. Potts, Jr., have also been deprived of cognizable "liberty interests" in the

faculty grievance procedure. In the *Board of Regents v. Roth, supra*, the United States Supreme Court established the bounds of "liberty interest." The court established that where a person's good name, reputation, honor, or integrity were at stake, an opportunity to be heard was essential. (Page 2707) Further, the court recognized a liberty interest in refuting a "stigma" or other disability that foreclosed an employee's freedom to take advantage of other employment opportunities. Where liberty interests were involved, the injured employee had to be afforded an opportunity to clear his or her name. *Graves v. Duganne*, 581 F.2d 222 (9th Cir. 1978), *Buhr v. Buffalo Public School District No. 38*, 509 F.2d 1196 (8th Cir. 1974), *Cato v. Collins*, 539 F.2d 656 (8th Cir. 1974). A charge of conflict of interest or a question of honesty and integrity has been recognized as "liberty interest" sufficient to require procedural due process. *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980), *Conset Corp. v. Community Services Administration*, 655 F.2d 1291 (D.C. Cir. 1981).

The "liberty interests" of plaintiff-appellant, Georgiann L. Grace, of which she has been deprived are:

(1) suggestion of conflict of interest in violation of the Code of Ethics for Public Employees;

(2) Charge of excess absenteeism;

(3) Charge of abuse of leave policy;

(4) Publication of entry into Ms. Grace's personnel record of false and erroneous information without the opportunity to

rebut the "charges" of her Department Head; and

(5) Removal from the technical writing faculty, absent any justifiable reason;

(6) Publication of the stigma by the obvious appearance of having been removed from the technical writing faculty;

(7) Denial of procedural due process at prior levels of the grievance procedure.

The "liberty interests" of plaintiff-appellant, James B. Potts, Jr., which he has been deprived are:

(1) Written reprimand and charge of neglect of duty by his Department Head;

(2) Suggestion of conflict of interest in violation of the Code of Ethics for Public Employees;

(3) Publication or entry into Dr. Potts' personnel record are false and erroneous information without the opportunity to rebut these "charges".

Despite the assurances and claims of defendants that the Faculty Grievance Procedure is a confidential procedure, plaintiffs-appellants show that records of the entire proceeding are public record under Louisiana law. The only exemptions from the Public Records Act are those specifically provided in the Public

Records Act itself, R.S. 44:1 *et seq.* or "otherwise specifically provided by law". R.S. 44:1(2). There are no specific exemptions for faculty grievance proceedings under Louisiana law. In the case of *Mills v. Doyle*, 407 So.2d 348 (Fla.App. 4th Cir. 1981), copy attached, TAB 7, this very issue was addressed. A newspaper reporter requested that the Palm Beach County school system provide access to a grievance filed by a county school teacher. Access to the record was refused by the school system and suit was filed under the Florida Public Records Act. Even though there was a contract with the Classroom Teachers Association, the bargaining agent for classroom teachers, which required that grievance materials be kept confidential, the court refused to allow these records to be maintained as confidential. The court found the records to be public records under state law.

The Florida Appellate Court also considered a claim of exemption under the Federal Privacy Act. The court cited the Florida Supreme Court of *Shevin v. Byron, Harless, Schaffer, etc.*, 379 So.2d 633 (Florida 1980), copy attached TAB 8, which addressed the parameters of the Federal Privacy Act. The *Shevin* court noted the lack of guidance in the United States Supreme Court cases regarding privacy interests. The *Shevin* court did note that the Florida Constitution provided no right of disclosural privacy, but rather a security from unwarranted governmental intrusion also provided by the Fourth Amendment of the United States Constitution. Thus, the court concluded that a privacy interest in disclosure existed only where the documents sought were specifically exempted from the Public Records Act.

In the instant case, both plaintiffs-appellants, Georgiann L. Grace and James B. Potts, Jr., are faced with the suggestion or implication of conflict of interest under the Louisiana Code of Governmental Ethics, R.S. 42:1101. The seriousness of such a suggestion is addressed by the procedural language of the Code of

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Governmental Ethics which provides civil and criminal penalties in Sections 1153 through 1156. Furthermore, were the conflict issue raised under the Code of governmental Ethics, the same plaintiffs-appellants would be entitled to a "due process" hearing under R.S. 42:1141. Subsection (6) of R.S. 42:1141D provides that any public servant or other person who is the subject of such a hearing may have legal counsel, cross-examine witnesses, call witnesses, and present evidence in his own behalf. Certainly, the hearing procedure of defendants should be no less demanding.

The charge of neglect of duty against plaintiff-appellant, James B. Potts, Jr., if proven, would be cause for his discharge as a tenured professor under Article 9, Section 3 of the by-laws of the Board of Trustees for State Colleges and Universities, attached TAB 9. Additional charges against both plaintiffs-appellants of excess absenteeism and abuse of leave policy should be dealt with in no lesser manner. Both of these charges are sufficient to warrant investigation of the proper administrative body.

Defendants-appellees will no doubt argue that hearings in the Faculty Appeals Procedure at Northeast Louisiana University are confidential in nature. However, if records of grievances are "public records", publication to anyone is a possibility. In the case prospective employers, it should be expected to be a probability. Further, L.R.S. 17:3217 establishes those state colleges and universities under supervision and management of the Board of Trustees. These are Delgado Community College at New Orleans, Grambling State University, Louisiana Tech University, McNeese State University, Nicholls State University, Northeast Louisiana University, Northwestern State University, Southeastern Louisiana University and University of Southwestern Louisiana. Thus, by mere establishment of a grievance file or grievance proceeding, the information compiled in such a proceeding is in the

constructive possession of any of these colleges or universities. In essence, accumulation of grievance materials is constructively accumulated by each of these universities and has the effect of permanently tainting the professional reputation and expertise of those involved in such proceedings. The probability of dissemination above and beyond the appeals bodies themselves is readily apparent.

On the face of the record, plaintiffs-appellants, Georgiann L. Grace and James B. Potts, Jr., show clearly definable "liberty interests" sufficient to warrant a "due process" hearing regardless of the other factors involved.

3. Procedural Due Process, Hearing Requirements.

The practical implication of deciding that the Administrative Procedure Act applies or that constitutional guidelines mandate a "due process" hearing is nil. In the case of *Hagood v. Pickering*, *supra*, this Honorable Court equated a hearing under the Administrative Procedures Act with a constitutional "due process" hearing. Hence, if the court determines that proceedings under the Northeast Louisiana University Faculty Appeals Procedure fall under either criteria, the hearing requirements of the Louisiana Administrative Procedures Act are mandated.

The requirements of the Administrative Procedure Act are no more than a codification of federal constitutional "due process" requirements under existing case law.

Persons whose constitutionally protected rights are affected must be given the opportunity to effectively refute the charges made. *Colaizzi v. Walker*, 655 F.2d 828 (7th Cir. 1981). Sufficient due process should, at a minimum, provide the right to active

participation by counsel, *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011, *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir. 1980), *Mosley v. St. Louis Southwestern Railway*, 634 F.2d 942 (5th Cir. 1981), the right to cross-examine persons making charges, the right to call witnesses for rebuttal of charges, *Goldberg v. Kelly, supra*, *Dillon v. Pulaski County Special School Dist.*, 594 F.2d 699 (8th Cir. 1979) and, where credibility and veracity are at issue, the right to present evidence in the matter most effective to allow fair adjudication of the issues of truth and veracity. *Goldberg v. Kelly, supra.*

IV. *SUMMARY*

Plaintiffs-appellants' suit for Declaratory Judgment, attachments thereto, answers to interrogatories and admissions on file, together with affidavits show that there is no genuine issue as to material fact and that plaintiffs-appellants should be entitled to judgment as a matter of law. The appeal procedure employed by defendants is an "adjudication" within the intention of the Louisiana Administrative Procedure Act. By defendants own admission, the grievance procedure is authorized and mandated by statute. Review of the hearing procedures and transcript of hearings had previously shows that such hearings are *on the record.*

Further, plaintiffs-appellants show that their property interests or liberty interests are affected by implementation of the Faculty Appeals Procedure. The practical implication of deciding that the Administrative Procedure Act applies or that constitutional guidelines mandate a "due process" hearing is nil. In the case of *Hagood v. Pickering, supra*, the court equated a hearing under the Administrative Procedures Act with a constitutional "due process" hearing. Thus, if the court determines that proceedings under the

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Northeast Louisiana University Faculty Appeals Procedure fall under either criteria, the hearing requirements of the Louisiana Administrative Procedure Act are mandated.

For these reasons, plaintiffs-appellants are entitled to a reversal of the judgment of the trial court in favor of defendants-appellees. Plaintiffs-appellants should be granted summary judgment in, their favor requiring that hearings in the Northeast Louisiana University Faculty Appeal Procedure be conducted in compliance with the Louisiana Administrative Procedures Act. Alternatively, if the procedures employed are not procedures required or mandated by constitution or statute for purposes of the Administrative Procedures Act, said hearings should provide procedural "due process" which is equated under Louisiana law with the requirements for an "adjudication" in the Administrative Procedures Act.

Respectfully submitted,

BY ATTORNEYS;

PREIS, CRAWFORD, SCHEFFY,
MAULDIN & RYAN
P.O. Box 3656
Baton Rouge, Louisiana 70821
504/343-5290

By: s/ J. Rodney Ryan, Jr.
J. RODNEY RYAN, JR.

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing memorandum was sent by the U.S. Mail, postage prepaid and properly addressed to Mr. Winston DeCuir and Ms. Cynthia D. Young, Department of Justice, Post Office Box 44005, Capital Station, Baton Rouge, Louisiana 70804.

Baton Rouge, Louisiana, this the 28th day of February, 1983.

s/ J. Rodney Ryan, Jr.
J. RODNEY RYAN, JR.

APPENDIX D — FIRST SUPPLEMENTAL AND AMENDING PETITION FOR THE 19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA FILED SEPTEMBER 23, 1982

NUMBER 258,279 DIVISION "L"

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

GEORGIANN L. GRACE and JAMES B. POTTS, JR.

versus

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, NORTHEAST LOUISIANA UNIVERSITY and FACULTY APPEALS COMMITTEE, NORTHEAST LOUISIANA UNIVERSITY

FIRST SUPPLEMENTAL AND AMENDING PETITION

The First Supplemental and Amending Petition of Georgiann L. Grace and James B. Potts, Jr., petitioners herein, respectfully represents that petitioners desire to supplement and amend their original petition filed herein on July 13, 1982, in the following respects:

1.

By amending paragraph 3 to read as follows:

> On October 21, 1981, petitioner, Georgiann L. Grace, filed a faculty grievance with her

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Academic Dean in compliance with the Northeast Louisiana University Handbook, 1981-82 (Exhibit 2). The language therein purports to create a mandatory appeal procedure for faculty members concerned as an adjunct to the regular teaching contracts. The Faculty Appeal Procedure purports to require exhaustion of each remedy in the appeal process before appeal to the next level.

2.

By amending paragraph 15 to read as follows:

Petitioners further show that the employment of the Faculty Appeal Procedure by Northeast Louisiana University and Faculty Appeals Committee, Northeast Louisiana University as provided in the Faculty Handbook is an unauthorized use of the authority of defendant, Board of Trustees for State Colleges and Universities. No delegation of this authority to Northeast Louisiana University or the Faculty Appeals Committee has been made by the Board of Trustees in compliance with the rule-making requirements of the Louisiana Administrative Procedure Act, R.S. 49:951 *et seq.* Thus, the Faculty Appeals Committee, Northeast Louisiana University, is an invalidly constituted body having had no delegation of authority by the Board of Trustees for State Colleges and Universities to conduct grievance hearings.

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3.

By amending paragraph 17 to read as follows:

> Further in the alternative, should defendants not be held to the requirements of the Administrative Procedure Act, R.S. 49:951 *et seq.*, these petitioners have property rights or liberty interests cognizable under the Louisiana Constitution of 1974 and the United States Constitution of which they are being deprived by the current procedure employed in the Faculty Appeals Procedure, Northeast Louisiana University. Petitioners show that the restitution of monetary benefits in the course of the grievance of Georgiann L. Grace indicates the nature of the property interest.
>
> Petitioners further show that additional property interest involved in the grievance proceeding are as follows:
>
> *Mrs. Grace:*
>
> > (a) removal from the English Department's Technical Writing Program where "entitlement" to teach courses in the program was established by fulfillment of requirements of her Academic Dean and Department Head;
> >
> > (b) personal financial loss in incurring costs to develop expertise sufficient to teach technical writing;

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(c) inadequate salary adjustment for the year 1981-1982; and

(d) restrictions on consulting and other forms of professional development inconsistent with those imposed on other members of the English faculty and other faculties of Northeast Louisiana University.

Dr. Potts:

(a) denial of permission for travel for professional growth and development;

(b) selective enforcement of regulations by Department Head;

(b) written reprimand and charge of neglect of duty by the Department Head; and

(d) denial of salary increases commensurate with rank, tenure, and contributions to the University.

4.

By amending paragraph 18 to read as follows:

Petitioners have been advised that records and findings in the grievance procedure are presently kept in a separate personnel file

pending ultimate resolution. Upon unsuccessful conclusion of the grievance procedure, copies of all pertinent grievance documents and results of the grievance procedure will be permanently incorporated in their individual personnel files. The incorporation of this data constitutes a violation of a protected liberty interest. Further liberty interest of petitioners that are involved are:

Mrs. Grace:

(a) removal from the technical writing faculty absent any justifiable reason;

(b) publication of this stigma by the obvious appearance of having been removed from the technical writing faculty;

(c) suggestion of conflict of interest in violation of the Code of Ethics for Public Employees;

(d) charge of excess absenteeism;

(e) charge of abuse of leave policy;

(f) publication or entry into Ms. Grace's personnel record of false and erroneous information without the opportunity to rebut the "charges" of her Department Head; and

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(e) denial of procedural due process at prior levels of the grievance procedure.

Dr. Potts:

(a) written reprimand and charge of neglect of duty by other Department Head; and

(b) publication of entry into Dr. Potts' personnel record of false and erroneous information without the opportunity to rebut these "charges".

5.

By amending paragraph 19 to read as follows:

Petitioners have thereby been and will continue to be deprived of property rights or liberty interests cognizable under Article 1, Section 2 of the Louisiana Constitution of 1974 and of the Fourteenth Amendment of the Constitution of the United States. Petitioners further show that the employment of the Faculty Appeal Procedure of Northeast Louisiana University is violative of Article 1, Section 19 and Article 1, Section 22 of the Louisiana Constitution of 1974 and the Fourteenth Amendment of the Constitution of the United States.

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6.

By amending paragraph 20 to read as follows:

> Petitioners have been denied procedural and substantive due process under Article 1, Section 2 of the Louisiana Constitution of 1974 and the Fourteenth Amendment of the Constitution of the United States in the following respects:
>
> a. Denial of the right to cross-examine witnesses and parties in the grievance procedure
>
> b. Denial of the right to compel appearance of witnesses by subpoenas
>
> c. Denial of the right to compel production of documents by subpoena duces tecum
>
> d. Denial of effective representation by counsel
>
> e. Imposition of the burden of proof of going forward and persuasion
>
> f. Denial of the right to rebut testimony and evidence presented by the respondent
>
> g. Denial of other essential elements of constitutional due process

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7.

By amending paragraph 2 of the prayer as follows:

> Alternatively, petitioners pray that their property and liberty interests under Article 1, Section 2 of the Louisiana Constitution of 1974 and the Fourteenth Amendment of the Constitution of the United States be recognized and this Court declare that defendants, Board of Trustees for State Colleges and Universities, Northeast Louisiana University and Faculty Appeals Committee, Northeast Louisiana University, are required to afford procedural due process to these petitioners in any informal or formal grievance proceeding hereafter had.

8.

By adding an additional paragraph to the prayer which states as follows:

> Petitioner, Georigann [sic] L. Grace, prays that the hearings had before her Academic Dean and Vice-President of Academic Affairs be declared invalid as having been in violation of substantive and due process under the Louisiana Constitution, United States Constitution and the Louisiana Administrative Procedure Act.
>
> Petitioner, James B. Potts, Jr., further prays that the procedure employed by defendants at the

level of the Academic Dean and Vice-President of Academic Afairs [sic] be declared invalid as having been in violation of substantive and due process under the Louisiana Constitution, United States Constitution and the Louisiana Administrative Procedures Act.

WHEREFORE, petitioners, Georgiann L. Grace and James B. Potts, Jr., pray for a leave of court to file this First Supplemental and Amending Petition.

WHEREFORE, petitioners, Georgiann L. Grace and James B. Potts, Jr., reiterating the allocations and prayer of their original petition as amended by their First Supplemental and Amending Petition pray that after all due proceeding had, there be judgment rendered in their favor in all respects as prayed for in their original petition as amended by the First Supplemental and Amending Petition.

BY ATTORNEYS:

PREIS, CRAWFORD, SCHEFFY, MAULDIN & RYAN
Post Office Box 3656
Baton Rouge, Louisiana 70821
504/343-5290

By: s/ J. Rodney Ryan, Jr.
J. RODNEY RYAN, JR.

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ORDER

Considering the foregoing,

Let the First Supplemental and Amending Petition of petitioners, Georgiann L. Grace and James B. Potts, Jr., be filed.

Baton Rouge, Louisiana, this 23 day of September, 1982.

s/ Douglas M. Gonzales
JUDGE
19TH JUDICIAL DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing First Supplemental and Amending Petition has been sent this date through the U.S. Mail, postage prepaid and properly addressed to Mr. Winston Decuir and Ms. Cynthia Young.

Baton Rouge, Louisiana, this 23rd day of September, 1982

s/ J. Rodney Ryan, Jr.
J. Rodney Ryan, Jr.

INFORMATION FOR SERVICE:

Please Serve:

Defendants, Board of Trustees for State Colleges and Universities,
Northeast Louisiana University and Faculty Appeals Committee,
Northeast Louisiana University
through their attorney of record

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Ms. Cynthia D. Young
Department of Justice
Baton Rouge, Louisiana
22nd Floor State Capitol

APPENDIX E — PETITION FOR DECLARATORY JUDGMENT AND STAY OF ADJUDICATION PROCEEDING FILED JULY 13, 1982

NUMBER 258.279 DIVISION "L"

19th JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

GEORGIAN L. GRACE and JAMES B. POTTS, JR.

versus

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, NORTHEAST LOUISIANA UNIVERSITY and FACULTY APPEALS COMMITTEE, NORTHEAST LOUISIANA UNIVERSITY

PETITION FOR DECLARATORY JUDGMENT AND STAY OF ADJUDICATION PROCEEDING

The Petition of Georgiann L. Grace and James B. Potts, Jr., residents of lawful age of the Parish of Ouachita, State of Louisiana, respectfully represents that:

1.

Petitioner, Georgiann L. Grace, was a regular instructor at Northeast Louisiana University under teaching contract for the 1981-1982 school year (Exhibit 1). Plaintiff, James B. Potts, Jr., is a tenured full professor at Northeast Louisiana University having

taught under contract for the 1981-1982 school year; both petitioners were employed in the same capacities for the 1980-1981 school year at Northeast Louisiana University.

2.

Defendant, Board of Trustees for State Colleges and Universities, is a body corporate created by Article 8, Section 5 of the Louisiana Constitution of 1974 and a department, agency or other entity under R.S. 49:951 *et seq.* having its domicile in Baton Rouge, Louisiana. Defendant, Northeast Louisiana University, is a body corporate and department, agency or other entity of the State of Louisiana under R.S. 49:951 *et seq.*, having its domicile in the Parish of Ouachita, State of Louisiana. Defendant, Faculty Appeals Committee, Northeast Louisiana University is an operating unit of defendant, Northeast Louisiana University, and a department, agency or other entity of the State of Louisiana under R.S. 49:951 *et seq.*, having its domicile in the Parish of Ouachita, State of Louisiana.

3.

On October 31, 1981, petitioner, Georgiann L. Grace, filed a faculty grievance with her Academic Dean in compliance with the Northeast Louisiana University Handbook, 1981-82 (Exhibit 2). The language therein purports to create a mandatory appeal procedure for faculty members concerned as an adjunct to the regular teaching contracts. The Faculty Appeal Procedure purports to require exhaustion of each remedy in the appeal process before appeal to the next level.

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4.

Having exhausted the initial step in the appeal process by discussion with her Department Head, petitioner, Georgiann L. Grace, was provided a hearing before her Academic Dean on November 20, 1981. Following this hearing, a report was rendered by her Academic Dean on December 8, 1981, awarding relief in one specific grievance while denying relief on the remaining issues. The favorable ruling of the Academic Dean resulted in restoration of retained salary in the amount of Two Hundred Seventeen and 92/100 ($217.92) Dollars.

5.

On December 16, 1981, petitioner, Georgiann L. Grace, appealed the ruling of the Academic Dean to the Vice-President, Academic Affairs, Northeast Louisiana University. The hearing was had at this level on March 3, 1982. No revision was made of the prior findings and petitioner, Georgiann L. Grace, was authorized to proceed to the Faculty Appeals Committee. On March 8, 1982, petitioner, Georgiann L. Grace, filed a written request for hearing before the Faculty Appeals Committee. By letter of March 24, 1982, a statement of procedures employed in hearings before the Committee was provided to petitioner (Exhibit 3).

6.

Petitioner, Georgiann L. Grace, was advised of a hearing date of April 23, 1982, before the Faculty Appeals Committee. By letter of her counsel dated April 14, 1982, petitioner addressed the inadequacy of the procedure before the Faculty Appeals Committee and requested a number of changes in the procedural rules of the Committee. Petitioner also requested production of

documents in the possession of Northeast Louisiana University to assist her in presentation of her grievance.

7.

On April 16, 1982, on motion of the Faculty Appeals Committee, the hearing date of April 23, 1982, was continued pending request for an opinion from the Louisiana Attorney General's office. On May 18, 1982, petitioner was advised of a hearing date of June 11, 1982, at 9:00 a.m. By letter of May 26, 1982, petitioner was advised that selected documents in possession of Northeast Louisiana University would be provided prior to the hearing. However, by reference to Opinion #81-1013 (Exhibit 4) of the Louisiana Attorney General, modification of hearing procedures was denied. On June 3, 1982, petitioner was again advised of a continuance of the hearing set for June 11, 1982. By letter of June 7, 1982, the Faculty Appeals Committee advised of another hearing date of July 16, 1982, at 1:00 p.m.

8.

On July 6, 1982, petitioner was given a revised hearing format to apply to the hearing of July 16, 1982 (Exhibit 5).

9.

Petitioner, James B. Potts, Jr., has pursued the Faculty Appeal Procedure of Northeast Louisiana University and has exhausted step one of the Faculty Appeal Procedure which requires discussion of his grievance with his Department Head. By letter dated May 10, 1982, petitioner has filed a formal faculty appeal with his Academic Dean. Petitioner, James B. Potts, Jr., is awaiting hearing before his Academic Dean.

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10.

Petitioner, James B. Potts, Jr., shows that as the result of the grievance of petitioner, Georgian L. Grace, he also has been restored monetary benefits in the form of annual leave days having value as of the date of use. The current approximate value of these leave days is Five Hundred Twenty-Five ($525.00) Dollars.

11.

Petitioners, Georgian L. Grace and James B. Potts, Jr., bring this Declaratory Judgment suit pursuant to R.S. 49:963-965 and Articles 1871 *et seq.* of the Louisiana Code of Civil Procedure. Petitioners show that the rules of procedure employed by defendants for the Northeast Louisiana University Faculty Appeal Procedure are "rules" of these agencies under R.S. 49:951 adopted in violation of R.S. 49:953 and 954. By letter of counsel dated April 14, 1982, a request was made for modification of these rules or procedures to comply with the Administrative Procedure Act, R.S. 49:951 *et seq.* This request has been denied.

12.

Petitioners further show that none of the defendants have adopted rules of practice setting forth the nature and requirements of formal and informal procedures available within the agency as provided in R.S. 49:952(2), 953, and 954.

13.

Petitioners show that the Northeast Louisiana University Faculty Appeal Procedure is an "adjudication proceeding" within the meaning of R.S. 49:951 *et seq.* and that the rules of procedure

provided in R.S. 49:955, 956, 957, 958 and 963 have not been followed by defendants.

14.

Petitioners have been advised by the Board of Trustees for State Colleges and Universities that there are no written rules or regulations for faculty appeal procedures, that it does not recognize an appeal of right from the Northeast Louisiana University Faculty Appeal Procedure, that the Faculty Appeal Procedure is mandatory and that fact-finding is made at the University Faculty Appeal level.

15.

Petitioners further show that the by Northeast Louisiana University and Faculty Appeals Committee, Northeast Louisiana University grievance procedure as provided in the Faculty Handbook is an unauthorized use of the authority of defendant, Board of Trustees for State Colleges and Universities. No delegation of this authority to Northeast Louisiana University or the Faculty Appeals Committee has been made by the Board of Trustees in compliance with the rule-making requirements of the Louisiana Administrative Procedure Act, R.S. 49:951 *et seq.* Thus, the Faculty Appeals Committee, Northeast Louisiana University, is an invalidly constituted body having had no delegation of authority by the Board of Trustees for State Colleges and Universities to conduct grievance hearings.

16.

Alternatively, petitioners show that defendant, Board of Trustees for State Colleges and Universities, is without authority

to hold grievance procedures since its enabling legislation does not so provide.

17.

Further in the alternative, should defendants not be held to the requirements of the Administrative Procedure Act, R.S. 49:951 *et seq.*, these petitioners have property rights or liberty interests cognizable under the Louisiana Constitution of 1974 of which they are being deprived by the current procedure employed by the Faculty Appeals Committee, Northeast Louisiana University. Petitioners show that the restitution of monetary benefits in the course of the grievance of Georgiann L. Grace indicates the nature of the property interest.

18.

Petitioners have been advised that records and findings in the grievance procedure are presently kept in a separate personnel file pending ultimate resolution. Upon unsuccessful conclusion of the grievance procedure, copies of all pertinent grievance documents and results of the grievance procedure will be permanently incorporated in their individual personnel files. The incorporation of this data constitutes a violation of a protected liberty interest.

19.

Petitioners have thereby been and will continue to be deprived of property rights or liberty interests cognizable under Article 1, Section 2 of the Louisiana Constitution of 1974. Petitioners further show that the employment of the Faculty Appeal Procedure of Northeast Louisiana University is violative of Article 1, Section 19 and Article 1, Section 22 of the Louisiana Constitution of 1974.

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20.

Petitioners have been denied procedural and substantive due process under Article 1, Section 2 of the Louisiana Consitution of 1974 in the following respects:

a. Denial of the right to cross-examine witnesses and parties in the grievance procedure

b. Denial of the right to compel appearance of witnesses by subpoenas

c. Denial of the right to compel production of documents by subpoena duces tecum

d. Denial of effective representation by counsel

e. Imposition of the burden of proof of going forward and persuasion

f. Denial of the right to rebut testimony and evidence presented by the respondent

g. Denial of other essential elements of constitutional due process

21.

Petitioners show that review of the validity and applicability of the rules and/or adjudication proceeding in conjunction with review of the final decision of the Faculty Appeals Committee,

Northeast Louisiana University, would not provide an adequate remedy and would inflict irreparable injury.

WHEREFORE, petitioners, Georgiann L. Grace and James B. Potts, Jr., pray that defendants, Board of Trustees for State Colleges and Universities, Northeast Louisiana University and Faculty Appeals Committee, Northeast Louisiana University be served with a copy of this petition and cited appear and answer the same and that, after all due proceedings had, there be judgment in favor of petitioners and against defendants, Board of Trustees for State Colleges and Universities, Northeast Louisiana University and Faculty Appeals Committee, Northeast Louisiana University, declaring that these defendants comply with the provisions of the Louisiana Administrative Procedure Act (R.S. 49:951 *et seq.*) both as to implementation of practice and procedures to be employed in formal, informal procedures and adjudications in any hearing before those defendants on issues raised herein.

Alternatively, petitioners pray that their property and liberty interests under Article 1, Section 2 of the Louisiana Constitution of 1974 be recognized and this Court declare that defendants, Board of Trustees for State Colleges and Universities, Northeast Louisiana University and Faculty Appeals Committee, Northeast Louisiana University, are required to afford procedural due process to these petitioners in any informal or formal grievance proceeding hereafter had.

Further in the alternative, petitioners pray that the entire Faculty Appeal Procedure of Northeast Louisiana University be declared unconstitutional, there having been no authorized delegation of the authority of the Board of Trustees for State Colleges and Universities to Northeast Louisiana University or Faculty Appeals Committee, Northeast Louisiana University, and

further declaring that petitioners are not required to undergo or participate in the Faculty Appeals Procedure prior to exercising any other form of redress at law.

Petitioner, Georgiann L. Grace, further pray that, pending a hearing on the issues raised in this Declaratory Judgment suit, a stay of the Faculty Appeals Committee hearing be ordered.

Petitioner, James B. Potts, Jr., prays that, pending a hearing on the issues raised in this Declaratory Judgment suit, a stay of any further proceedings under the Northeast Louisiana University Faculty Appeal Procedure be ordered.

Petitioners further pray that defendants, Board of Trustees for State Colleges and Universities, Northeast Louisiana University and Faculty Appeals Committee, Northeast Louisiana University, be taxed all costs of these proceedings.

BY ATTORNEYS:
PREIS, CRAWFORD, SCHEFFY, MAULDIN & RYAN
Post Office Box 3656
Baton Rouge, Louisiana 70821
504/343-5290

By: s/ J. Rodney Ryan, Jr.
J. RODNEY RYAN, JR.

Appendix E

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the Parish of East Baton Rouge, State of Louisiana, personally came and appeared:

GEORGIANN L. GRACE

who, being by me duly sworn did depose and state that she is a petitioner in the foregoing Petition for Declaratory Judgment and Stay of Adjudication Proceeding, that she has read each and every allegation of fact therein contained and that the information upon which such allegations of fact are made is true and correct to the best of her knowledge, information and belief.

Baton Rouge, this 12th day of July, 1982.

s/ Georgiann L. Grace
GEORGIANN L. GRACE

s/ J. Rodney Ryan, Jr.
J. RODNEY RYAN, JR.
NOTARY PUBLIC

Appendix E

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the Parish of East Baton Rouge, State of Louisiana, personally came and appeared:

JAMES B. POTTS, JR.

who, being by me duly sworn did depose and state that he is a petitioner in the foregoing Petition for Declaratory Judgment and Stay of Adjudication Proceeding, that he has read each and every allegation of fact therein contained and that the information upon which such allegations of fact are made is true and correct to the best of his knowledge, information and belief.

Baton Rouge, this 12th day of July, 1982.

s/James B. Potts, Jr.
JAMES B. POTTS, JR.

s/J. Rodney Ryan, Jr.
J. RODNEY RYAN, JR.
NOTARY PUBLIC

Appendix E

NUMBER 258279 DIVISION "L"

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

GEORGIANN L. GRACE and JAMES B. POTTS, JR.

versus

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, NORTHEAST LOUISIANA UNIVERSITY and FACULTY APPEALS COMMITTEE, NORTHEAST LOUISIANA UNIVERSITY

ORDER

Considering the foregoing Petition for Declaratory Judgment and Stay of Adjudication Proceeding of Georgiann L. Grace and James B. Potts, Jr.,

IT IS ORDERED that any further proceedings regarding the grievances of Georgiann L. Grace and James B. Potts, Jr. under the Northeast Louisiana University Faculty Appeal Procedure be stayed until further order of this court.

Baton Rouge, Louisiana, this 15 day of July, 1982.

s/ Douglas M. Gonzales
JUDGE
19TH JUDICIAL DISTRICT COURT

No. 93-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GEORGIANN L. GRACE and JAMES B. POTTS, JR.,
Petitioners,

v.

FRANK MORGAN, JR., DWIGHT D. VINES and
DAVID K. JEFFREY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Respondents suggest that the questions presented by petitioners unnecessarily complicate the issue for the court's consideration. Keeping in mind that the content and form of petitioners' state court suit are not disputed and that both the district and appeals courts found that petitioners filed their state court suit in the context of and primarily in furtherance of their own personal grievances, the only issue here is:

> When, in the context of and primarily in furtherance of their own previously lodged personnel grievances, state university employees exercise speech in the form of a state court suit, the contents of which relate primarily to these personal employee grievances but contest the university personnel grievance procedure and seek to enjoin its use in their own grievances, is the filing of such a suit protected First Amendment activity?

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STATEMENT OF THE CASE

Respondents vigorously object to the characterization and "spin" petitioners have given to this case and, further, suggest that much of the factual material claimed by petitioners is not relevant in this proceeding.

For example, Grace was not "terminated." Grace was an untenured English instructor hired by NLU on a year-to-year basis. Her contract, along with three other instructors who were similarly "doubly inbred" (all four had both their B.A. and M.A. degrees from NLU), was not renewed after NLU recruited Dr. Jeffrey from Auburn to become the new department head and after he began a program to upgrade the department and replace temporary instructors holding only M.A.'s, especially those who had NLU M.A.'s, with young Ph.D.'s. The timing of the notice of non-renewal was unfortunate, but was dictated by terms of Mrs. Grace's contract requiring notice of non-renewal by a certain date.

Similarly, Potts was not "demoted." His only claims were that his salary, which was already higher than that for most of the department's faculty, was not increased commensurately with others, that he did not like the classes he was assigned to teach, and that his class load was heavier than certain other faculty members. Dr. Jeffrey testified that other faculty members were more deserving of greater salary increases, that Potts was assigned to teach more classes because he was not publishing and had no administrative duties, and that the class assignments were necessary to accommodate Potts' own schedule requests.

As another example, there was no credible evidence that Grace's office was "trashed." Petitioners abandoned

that claim at trial.

Prior to trial petitioners asserted many, many claims against a number of defendants, and never focused on their state court suit/free speech claim. Because of their volume, and the shotgun and amorphous nature of these many claims, the trial court had instructed petitioners to provide "a short, clear description of each plaintiff's specific claims against each defendant." Nevertheless, plaintiffs responded with fifty-two pages! R., p.1055. One claim, the state court suit/free speech claim, slipped through defendants' defenses, with the jury returning a verdict in favor of petitioners on that issue against three defendants. Since petitioners do not now complain about the district court's granting a new trial and only seek review of its subsequent summary dismissal, respondents suggest that the only facts necessary for the court's consideration are those that follow, if this much:

Dr. Potts and Mrs. Grace, who was hired by Dr. Potts when he previously served as department head, pursued several grievances against the actions of the department head who served after Dr. Potts but before Dr. Jeffrey. These grievances mostly involved the denial of Dr. Potts' and Mrs. Grace's demands that they be allowed to miss their classes and travel out-of-town together to pursue their private consulting business, their complaints about inadequate salary increases, and Mrs. Grace's demands that she be assigned to teach certain courses.

Petitioners pursued these grievances utilizing the faculty grievance procedure as provided in the *Faculty Handbook*, were dissatisfied with the results they achieved at the lower levels of the grievance process, and then prior to the later stages of appeal in the grievance proceeding filed a suit in state court contesting the procedures set forth in the

handbook and seeking a temporary stay of further consideration of their grievances. This suit was clearly a part of petitioners' continuing efforts and was filed in the context of and primarily for that purpose. While the trial testimony and other materials considered by the district court on the summary judgment motion support this conclusion, no review of them is necessary because the conclusion is clearly evident from the state court's pleadings themselves, which appear as Appendices D and E to petitioners' application. Moreover, the petitioners themselves do not appear to seriously contest this characterization of their state court suit.

SUMMARY OF THE ARGUMENT

(1) Petitioners' claim that *Connick* was misapplied here.

Petitioners claim that the lower courts misapplied *Connick v. Myers*[1] in this case and that the Fifth Circuit does so on a regular basis.

Connick directs that courts examine three aspects of questioned speech to determine whether it qualifies as "a matter of public concern," which in turn will be deemed constitutionally protected if it also passes the *Pickering* test for balancing the protected nature of the speech with the disruption that it may cause. The three examination criteria are content, form and context, considering all of the circumstances of the case. The lower courts in the case at bar meticulously examined all of the circumstances of the case in light of these three criteria and concluded that petitioners acted not as citizens speaking out on a matter of

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[1] *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

public concern but as employees upon matters of personal interest.

Petitioners claim that the lower courts should not have considered all three criteria and should have only considered content. They say that some of the courts of appeal follow this view and that a writ is necessary to correct the alleged error in this case and resolve the conflicts between the circuits. However, there is no conflict between the circuits. Further, even the approach taken in the court of appeals case most favorable to petitioners would still result in a judgment in favor of respondents because it holds that mere content is sufficient only in cases where the speech is inherently a matter of public concern and that in other instances the courts must also consider form and context. Another reason that the utilization of this approach would still result in a judgment in respondents' favor is that, even if only the contents of the state court suit were considered, these contents nonetheless are primarily about petitioners' personal grievances and only touch on issues which may be of concern to the public.

Petitioners apparently counter that *Connick* should be interpreted so that if the speech even just touches on a matter of potential public interest then the entire speech should be considered a matter of public concern and should be given protected constitutional status. This argument, however, flies in the face of the *Connick* requirements that form and context as well as content be examined. Moreover, such an approach would be completely unworkable, since almost anything concerning public employment is potentially a matter of public interest and almost all public personnel disputes would thereby be elevated to constitutional status and require the federal judiciary to be their final arbiter.

(2) Petitioners' claim that any motive inquiry is for the jury.

It is well-settled by the jurisprudence of this court that the determination as to whether speech is protected is a question of law and is not a matter for the jury.

Moreover, even if content, form and context were normally matters for a jury to decide, in this case there is no genuine issue as to material fact relating to them and summary judgment would be appropriate.

(3) Petitioners' claim that Petition Clause confers greater rights than Free Speech Clause.

Petitioners claim because their state court suit was an act of petitioning it does not even have to address a matter of public concern. However, this and other federal courts have already determined that the Petition Clause does not have special First Amendment status, and that acts of petitioning must address matters of public concern.

Moreover, a different rule would open a floodgate of federal litigation.

ARGUMENT

I.

PETITIONERS' CLAIMS THAT *CONNICK* WAS NOT FOLLOWED IN THIS AND OTHER FIFTH CIRCUIT CASES

Petitioners claim that the Fifth Circuit misconstrued

and misapplied *Connick* in this and other cases, and by claiming that the circuits "are divided," suggest that there is a conflict between them. However, in this case the lower courts meticulously and faithfully followed *Connick's* instructions. Moreover, there is not a conflict among the circuits, and their decisions are consistent with *Connick*.

A. The Lower Courts Correctly Applied *Connick* Here

In the case at bar the two lower courts went through an exhaustive analysis of the relevant facts to apply *all* of the *Connick* criteria. They did not merely consider petitioners' motive, as their writ application suggests.

Connick teaches that speech is not protected "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest ...." 461 U.S. at 147.

It further states that such "*a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record.*" (Emphasis added.) *Ibid.*

In an exceedingly well-reasoned opinion (which appears on pages 17a-26a of petitioners' writ application), the district court closely examined all three factors. It concluded that while the form of the petitioners' speech was a lawsuit and therefore in a public forum, that fact alone was not determinative, and that both the content (a suit which touched on matters of public concern but which was primarily about petitioners' personal grievances) and the context (filing to obtain relief for petitioners' own personal grievances as part of a continuing personnel dispute) showed that petitioners spoke primarily as disgruntled employees.

(Pp. 21a-26a.)

The court of appeals made a very similar analysis, considering all three factors. (Petitioners' writ application, pp. 5a-11a.)

B. *Connick* Is Not "Content Determinative," As Petitioners Claim

The main theme of petitioners' writ application is their claim that this court in *Connick* mandated a "content determinative" test (p. 13), meaning that if "any part of the communication addresses an issue of 'public concern'" it is protected (p. 19.)

This claim, however, flies in the face of the clear instructions in *Connick* that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." Moreover, petitioners' test would be completely unworkable. "Because almost anything that occurs within a public agency could be of concern to the public,"[2] other factors, such as form, context and the degree and importance to the public of the speech's content, must be considered. Otherwise the federal courts would find themselves as the final arbiters of most governmental employee disputes. In *Connick*, this court indicated that it had no desire to become so involved, and stated:

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[2]*Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). This court has made a similar remark in *Connick*: "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case." 461 U.S. at 149.

> Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State. 461 U.S. at 147.

Here, there are no unique or significant matters of public concern expressed. Petitioners' claim that the government entity's grievance procedure was unlawful is one that can be duplicated in one form or another in virtually every public employment setting. Therefore, if petitioners' argument is accepted it would give most grievants a powerful incentive to claim that they were retaliated against for complaining about personnel procedure, thereby drawing the federal judiciary into the resolution of these public employment disputes.

C. There Is No Conflict Between the Circuits, and Their Analyses Are Consistent With *Connick*

Petitioners claim that "[t]he Courts of Appeal have adopted numerous applications of the Connick Balancing Test, many of which are in direct conflict." Writ application, p. 10. They then describe the three "most prevalent" applications as "content determinative," "content balanced," and "motive determinative." Apparently the courts of appeal themselves do not use these terms and respondents suggest that they are artificial classifications which fail to describe the true state of the law in each circuit.

The failure of these terms to describe the state of the law in each circuit can be seen, first of all, in the fact that

according to petitioners' own computations five circuits (the Ninth, Tenth, Sixth, Eighth and Seventh) use more than one of these approaches! Text of writ application, pp. 10-11. Moreover, a close examination of the cases petitioners cite as falling within individual classifications reveal that in fact they all do not fit there, and that the classifications are forced.

In reality what the lower courts appear to be doing is applying *Connick*. They are examining the content, form and context of the speech as revealed by the whole record.

As an example, let us consider what is probably the most extreme case and the one with which the petitioners lead and take their best shot, *O'Connor v. Steeves*, 994 F.2d 905 (1st Cir. 1993). Apparently petitioners have chosen to emphasize *O'Connor* because it does claim that the appellate courts "have adopted various approaches" with some utilizing a "content based analysis" and others utilizing "an analysis which turns entirely or in part on the employees' subjective intent." *Id.* at 913. But this characterization, especially considered in light of the whole opinion, does not mean that these appellate courts are not following *Connick* or that their opinions conflict.

O'Connor acknowledges that the First Circuit's "own case law implicitly recognizes [that] the circumstances of a particular case may govern the appropriate approach under *Connick*." *Ibid.* It then takes the position that in some cases the speech's topic may be "clearly a legitimate matter of *inherent* concern to the electorate, [and in those] the court may eschew further inquiry into the employee's motives as revealed by the 'form and context' of the expression." (Emphasis in the original text.) *Id.* at 913, 914. It acknowledged, though, that "[o]n the other hand, public

employee speech on a topic which would not necessarily qualify, on the *basis of its content alone*, as a matter of inherent public concern ... may require a more complete *Connick* analysis into the form and context of the public employee expression ...." *Id.* at 914.

Further, the approach in *O'Connor* is actually similar to that taken by the Fifth Circuit in another case in which it considered only context to reach a conclusion that the speech there was inherently a matter of public concern. In *Johnson v. Harris County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989), that court noted that "[u]nder circumstances ... the context in which the employee speaks may be sufficient to elevate the speech to the level of public concern." *Id.* at 1577. It then held as a matter of law that "when one state employee testifies in another employee's civil action against their mutual state employer, the witness's testimony constitutes a matter of public concern for First Amendment purposes." *Ibid.*

As authority for its focusing only on context the Fifth Circuit cited *this* court's decision in *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), holding that constitutional protection was afforded to a county constable's clerical employee's "puerile" comment to the effect that she hoped that the next assassination attempt on President Reagan would be successful. There this court had no difficulty in deciding that the statement was a matter of public concern even though its content may be "inappropriate" or "erroneous," 107 S.Ct. at 2898, *"[c]onsidering the statement in context, as Connick requires ...."* (Emphasis added.) *Id.* at 2897.

D. Even Under A Test Based Solely on Content, Petitioners' Suit Would Not Be Constitutionally Protected

All *O'Connor* and the other "content determinative" cases stand for is that the content of some expressions is inherently of public concern and that for these expressions form and context need not be considered. It does not say that in cases such as the one at bar that mere content should control.

In fact, even if the *O'Connor* approach were applied to the case at bar it could not be said that an examination of the content of petitioners' state suit would result in a holding that the suit was constitutionally protected activity. As the lower courts held, the suit is primarily about petitioners' personal grievances and it by itself reveals that the suit was filed by petitioners as employees for the purpose of advancing their own ends. Surely the suit would not qualify as inherently a matter of public concern, and a consideration of context would result in the same judgment of dismissal which the Fifth Circuit upheld.

II.

PETITIONERS' CLAIM THAT ANY MOTIVE INQUIRY IS A MATTER FOR THE JURY

Petitioners claim that, if *Connick* requires or authorizes scrutiny of the motive for their state court suit, then such scrutiny is a matter for the jury.

Petitioners' argument misses the point. As explained previously, *Connick* teaches that the speech in question should be evaluated from the standpoints of its content, form

and context, considering the whole record. The lower courts here did so. Motive is relevant when considering each of these three factors to determine whether petitioners were primarily speaking as citizens on matters of public concern or whether they primarily spoke as employees on matters which were their own personal grievances.

Moreover, it is well-settled that the determination as to whether speech is protected is an inquiry of law, and is not a fact inquiry for the jury. *Connick* itself makes this point clear. 461 U.S. 148 n.7, 151 n.10. Also *Rankin v. McPherson, supra.*; *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984).

Still further, reasonable minds could not differ on the contents of petitioners' state court suit (content), the fact that the suit was filed (form), and the fact that the suit was filed by petitioners primarily if not entirely for the purpose of assisting them in their already on-going personal personnel dispute (context). Therefore, even if these issues normally would be within the province of the jury, in this case it would be appropriate for the court to make the determination. The court later did so by way of summary judgment, which was appropriate because there was no genuine dispute as to material fact.

III.

PETITIONERS' CLAIM THAT PETITION CLAUSE CONFERS GREATER RIGHTS THAN FREE SPEECH CLAUSE

A. Petitioners' Claim Is Contrary to Well-Settled Law

and A Change Would Be Unworkable

Petitioners' claim that the Petition Clause confers broader rights than the Free Speech Clause and, that when employees' actions can be considered acts of "petitioning" their government, the subject of such actions does not even have to be a matter of public concern in order for the actions to receive protected status.

The court of appeals in the decision below rejected this argument, stating:

> There is no support in authority or in logic for construing the petition clause more broadly than the speech clause. The Supreme Court stated this unequivocally in *McDonald V. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985):
>
> > To accept petitioner's claim ... would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition ... than other First Amendment expressions.

> 472 U.S. 479, 485 (1985). Similarly, in *Day v. South Park Indep. School Dist.*, 768 F.2d 696, 701 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1985), this court explicitly rejected the claim that matters of private concern, whether raised as speech or petition claims, are protected by the First Amendment's shield. (Writ application, p. 12a).

See also, *e.g.*, *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) at 470 U.S. 610 n.11 ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis."); *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989). (Employee's opposition to her demotion and filing suit related only to supervisor's employment decisions and were not considered matters of public concern; "[t]he law is no different where the act which allegedly gave rise to the retaliation claim is the filing of a grievance or law suit." 878 F.2d at 842); *Singh v. Lamar University*, 635 F.Supp. 737 (E.D. Tex. 1986) ("Although the right to petition and the right to free speech are inseparable guarantees, the rights were cut from the same cloth as other guarantees of the First Amendment...and therefore are generally subject to the same constitutional analysis," citing *Wayte, supra* and *McDonald v. Smith, supra.); Kemp v. State Board of Agriculture, et al*, 803 P.2d 498 (S.Ct. Co. 1990) (Petition rights are subject to the same "balancing" tests which apply to free speech and, under circumstances of case, right to petition U.S. senator was outweighed by university's interest in maintaining its grievance procedure.")

Moreover, if the law were changed as petitioners wish, such a change would not be workable and would open a floodgate of federal litigation. Since filing a grievance or even writing a letter to a governmental official are considered acts of petitioning, respondents suggest that a Petition Clause claim would be possible in a very substantial percentage of personnel disputes. Again, as this court noted in *Connick*, the function of federal courts is to ensure that citizens are not deprived of fundamental rights because of their government employment and it is not to provide them with greater rights than employees who do not work for the state. 461 U.S. at 147.

B. Petitioners' Claim that Petition Clause Provides Protection in Other Areas of the Law Without Any Showing of Public Concern

Petitioners apparently would have this court believe that the cases cited by them stand for the proposition that this court has already acknowledged that in anti-trust, labor, and prisoner access to the courts cases there can be no restrictions on or retaliation for the exercise of litigants' Petition Clause rights, even if there is no showing of "public concern." Writ application, pp. 25-30. However, such is not the case.

1. *Anti-Trust Field*

California Motor Transport Co. v. Trucking, Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), is advanced by petitioners as authority for their thesis in the anti-trust field. But this case supports no such view and, in fact, is authority for the principle that there *are* permissible governmental restrictions on petition rights.

In *California Motor Transport*, a number of highway carriers brought an action against other highway carriers, alleging that the latter had conspired to monopolize transit and to institute state and federal proceedings to defeat the formers' applications to acquire operating rights or to transfer or register those rights. The alleged conspirators defended by claiming that by the *Noerr* doctrine their petition clause rights could not be limited or restrained by the Sherman Act.

This court *rejected* that argument, pointing out that even in *Noerr* it had noted that there could be instances in which the filings by the alleged conspirators were "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 404 U.S. at 511, quoting *Eastern Railroad Presidents Conference v. Noerr Motorfreight, Inc.*, 365 U.S. 127,144, 81 S.Ct. 523, 533, 5 L.Ed.2d 464 (1961).

This court ruled therefore against the alleged conspirators, upholding the principle that the Sherman Act *prohibits* the exercise of petition rights if they are part of a conspiracy in restraint of trade.

2. *Labor Field*

The case advanced by petitioners as authority for their thesis in the labor field is no better. They cite *Bill Johnson's Restaurant, Inc. v. N.L.R.B.*, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983), as standing for the authority that the N.L.R.B. may not halt the prosecution of a state court lawsuit for damages as a result of libel and injury to business reputation allegedly caused by a picketing employee. Petitioners further claim that in this case "this

court held that the mere act of petitioning was protected...." Writ application, p. 27.

The basic facts were that an employee had filed an unfair labor practice charge after she was fired. The restaurant then filed its suit against the employee and other employees in Arizona state court. The employee then filed a second unfair labor practice charge, claiming that the state suit court was in retaliation for the employees' protected, concerted activities and for her first unfair labor practice charge. The N.L.R.B. found the state suit to be retaliatory and ordered it withdrawn.

This court did vacate the order and remand the case. However, it did *not* hold, as petitioners suggest, that the N.L.R.B. could not enjoin the suit. In fact, it clearly stated that the N.L.R.B. *could* enjoin a suit which was retaliatory or otherwise had an illegal objective under the N.L.R.A. The case was remanded only because the court decided that the administrative law judge had not made a sufficient factual inquiry.

In other words, just as with the case cited by petitioners for support of their thesis in the anti-trust field, this case actually disproves it in the labor field.

3. *Prisoner Access to the Courts Field*

Neither do the cases proffered by petitioners in the prisoner field support their thesis that they are entitled to protection under the Petition Clause without any showing of public concern.

The first case is *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). That case held that the

"fundamental right of access to the courts" required state prisons to provide adequate law libraries or adequate assistance from persons trained in the law. There appears to be nothing in the opinion to suggest that the holding was bottomed on the Petition Clause, and the precedent cases cited appeared to have been based upon habeas corpus rights. See 430 U.S. at 822, 825. The dissent complained that the "[t]he Court leaves us unenlightened as to the source of the 'right of access to the courts'...." 430 U.S. at 833.

The second case is *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), which held unenforceable a state prison rule prohibiting inmates from assisting other inmates in preparing writs and other legal papers. Again, the case involves habeas corpus rights and there appears to be no indication that the Petition Clause was in any way authority for the court's holding.

The third case is *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), which held that prison inmates are not entitled to Fourth Amendment protection against unreasonable searches and seizures in their cells. Respondents fail to discern how the Petition Clause is in any way implicated in this decision.

Petitioners also cited two courts of appeals decisions, the first of which is *Smith v. Maschner*, 899 F.2d 940 (10th Cir. 1990). *Smith* merely held that an inmate may have valid claims that he was denied procedural due process by the denial of his request to call a witness and that officials retaliated against him for exercising his "right of access to the courts." The Petition Clause appears not to have played any role in the decision.

The second case, *Franco v. Kelly*, 854 F.2d 584 (2nd Cir. 1988), does discuss the Petition Clause. There an inmate claimed he had been retaliated against for his cooperation in a state administrative investigation of allegations of inmate abuse, and the court decided his right to provide information on this subject was protected by his right to petition for redress of grievances.

This holding, however, is a far cry from setting forth a principle that there can be no restraints on a person's exercise of his petition rights and that public concern considerations are irrelevant. Indeed, the court of appeals was careful to note a public concern aspect of the inmate's speech/petition in that "the very same communications that *Franco* allegedly directed to state administrative authorities implicated an important constitutional right -- namely the Eighth Amendment right of prison inmates to be free from cruel and unusual punishment." 854 F.2d. at 590.

CONCLUSION

"[A] private office dispute [with a public employer] cannot be constitutionalized merely by filing a legal action." *Altman v. Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 385, 83 L.Ed.2d 320 (1984), quoted with approval in *Brinkmeyer v. Thrall Independent School Dist.*, 786 F.2d 1291, 1296 (5th Cir. 1986).

Respondents urge that petitioners' application for a writ of certiorari be denied.

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